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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ZOLLO DRUM COMPANY, INC. and
NRS CARTING COMPANY, INC.,
Petitioners,

v.

B.F. GOODRICH CO., DOW CORNING CORP., HOECHST CELANESE CORP., REYNOLDS ALUMINUM BUILDING PRODUCTS CO., UNIROYAL CHEMICAL COMPANY, INC., UPJOHN CO., and WHITE CONSOLIDATED INDUSTRIES,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal common law overrides state corporation law limitations on the imposition of successor liability on asset purchasers in cases under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601 *et seq.*

PARTIES TO THE PROCEEDINGS BELOW

The proceedings in the United States Court of Appeals for the Second Circuit consisted of four consolidated appeals concerning the cleanups of the Beacon Heights and Laurel Park Landfills in Connecticut. In addition to the petitioners (who were defendants-appellees below) and respondents (who were plaintiffs-appellants), the parties to the proceedings below were: plaintiffs-appellants United States of America, State of Connecticut, Environmental Waste Resources, Inc., Kerite Company, Unisys Corporation, Risdon Corp., Cadbury Beverages, Inc., Coltec Industries, Inc., Ken-Chas Reserve Co., Naugatuck Glass Co., and Naugatuck Treatment Co.; and defendants-appellees John Betkoski, George Clark, Armstrong Rubber Company, Thomas Ashmore, Borough of Naugatuck, Bristol Flowed Gasket Company, Connecticut Resources Recovery Authority, Dee's, Inc., also known as Dee's Refuse, Inc., Derby Tire Company, Eastern Company, General Roofing & Sheet Metal Co., Inc., Gerald Metals, Inc., C.R. Gibson Company, Hospital Marketing Services Co., Inc., Ideal Manufacturing Co., Jacob Brothers, Inc., Litton Systems, Inc., also known as Winchester Electronics, Manafort Brothers, Inc., NASCO, Inc., New Haven Housing Authority, Northeast Utilities, Frank Perrotti & Sons, Inc., Quality Rubber Co., Sanitary Refuse Co., Inc., Seymour Brass Turning Co., Sperry Rand Corporation, Stauffer Chemical Company, Town of Middlebury, Town of Thomaston, Town of Woodbury, Triangle Industries, Inc., Turner Construction Company, U.S. Prolam, Inc., Waterbury Companies, Inc., Watertown Housing Authority, Atlantic Richfield Co., Adam's Service Station, Armand's Auto Service, High Ridge Apartments, Ashmore Trucking, Beacon Outing Club, Boise Cascade Corporation, Brass Rail Restaurant, Coffee Shop, Crelan Construction Co., Connecticut Sheet Metal/Wood Co., Daddio's, David Rupsis, Edward Betowski, Elk's Lodge #967, George's Floor Covering, Horizon Homes, Korvette Services, La-

tella Carting Co., Lombard Bros., Inc., Long Meadow Care, McDonald's Restaurant, Meyers & Schwartz, Neal's Coffee Shoppe, Nelson Mendes, Portanova Trucking Co., Portuguese Club, Ray's Hardware, Shore's Auto Parts, Steve's Tires, Stop & Shop, Triangle Services, Trowbridge Apts., Valley Motor Trailer Sales, Valley Mobile Homes Park, Vieira Agency, Waterbury Pressed Metals, Town of Bethany, City of Waterbury, Capozziello Brothers, Town of Killingworth, Town of Beacon Falls, Naugatuck Y.M.C.A., E. Eric Arsan Refuse, John Ashmore, Joseph Betkoski, Connecticut Pharmacare, Inc. d/b/a Ford Pharmacy, First National Supermarkets, Inc., P. Francini Company, Town of Hamden, Jetzon Tire Co., City of Milford, Town of Orange, Peter Paul Cadbury, Town of Plymouth, Town of Seymour, Town of Stratford, Town of Watertown, and Town of Westport. Pursuant to Rule 12.6, petitioners have notified the Clerk of petitioners' belief that these parties have no interest in the outcome of this petition.

RULE 29.6 STATEMENT

Petitioners Zollo Drum Company, Inc. and NRS Carting Company, Inc. have no parent companies or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Zollo Drum Company, Inc. and NRS Carting Company, Inc. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 99 F.3d 505, and is reprinted in the appendix at 1a-62a. The court of appeals' opinion denying rehearing is reported at 112 F.3d 88, and is reprinted in the appendix at 84a-87a. The decision of the United States District Court for the District of Connecticut is reported at 840 F. Supp. 180, and is reprinted in the appendix at 63a-83a.

JURISDICTION

The court of appeals issued its decision on November 1, 1996, and denied rehearing on April 25, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix (at 89a-91a) sets forth verbatim the following statutory provisions: CERCLA § 101(21), 42 U.S.C. § 9601(21); CERCLA § 107(a), 42 U.S.C. § 9607(a); and CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

STATEMENT OF THE CASE

This is an action under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601 *et seq.*, to recover costs of remediating the Beacon Heights Landfill in Connecticut. Respondents, plaintiffs below, seek to hold petitioners liable under CERCLA for actions of other entities, from whom petitioners purchased assets, based on a federal common law theory of successor liability. Acknowledging that its decision conflicts with that of another circuit, the Second Circuit held that federal common law governs corporate successor liability under CERCLA, and preempts fundamental, long-standing principles of state corporation law protecting asset purchasers.

The Second Circuit's decision to create federal common law to displace state corporation law is in conflict with decisions of the First, Fifth, Sixth and Eleventh Circuits, and aggravates a circuit conflict that now has evenly divided eight courts of appeals. The Second Circuit's decision to create federal common law also conflicts with decisions of this Court which establish a strong presumption against creating federal common law to displace state corporate law, and which reject each of the specific arguments in favor of creating federal common law on which the Second Circuit relied.

While the Second Circuit acknowledged that most States apply a "mere continuation" exception to the general rule of asset purchaser nonliability (which protects an asset purchaser from successor liability unless it shares, at a minimum, common shareholders, directors, and officers with the seller), the Second Circuit created a liberalized federal common law "substantial continuity" standard of liability, preempting the traditional rule.

A. Federal Law Background

CERCLA is a comprehensive statute intended to promote the remediation of hazardous waste sites. The statute established an excise tax on chemical and petroleum feedstocks, the proceeds of which are placed into the Hazardous Substance Superfund, and used to pay for investigation and remediation of sites. *See* CERCLA §§ 101(11), 111, 42 U.S.C. §§ 9601(11), 9611; 26 U.S.C. §§ 59A, 4611, 9507(b).

CERCLA authorizes the United States to recover its Superfund expenditures from liable private parties, and to compel such parties to perform remedial work in the first instance. *See* CERCLA §§ 106(a), 107(a), 42 U.S.C. §§ 9606(a), 9607(a). CERCLA also allows private parties that have incurred cleanup costs to obtain contribution from other liable parties. CERCLA § 113 (f)(1), 42 U.S.C. § 9613(f)(1).

The statute imposes liability on any "person" within the four classes identified in CERCLA § 107(a), 42 U.S.C. § 9607(a): (1) the current owner or operator of the facility; (2) any "person" who owned or operated the facility at the time of disposal of any hazardous substances; (3) any "person" who arranged for disposal of hazardous substances it owned or possessed and which were disposed at the facility; and (4) any "person" who transported hazardous substances to disposal or treatment facilities selected by such person. The statute defines a "person" to include a corporation. CERCLA § 101(21),

42 U.S.C. § 9601(21). CERCLA does not define a "corporation", nor does it state any special rules as to when a purchaser of assets is responsible for the CERCLA liabilities of the asset seller.

B. Proceedings Below

Respondents are seven private corporations that have conducted investigative and remedial work at the Beacon Heights Landfill pursuant to a consent decree with the United States and the State of Connecticut. Respondents sued more than 200 defendants, including petitioners, to compel them to contribute to the costs of remediating the Landfill. The district court had exclusive original jurisdiction over respondents' CERCLA contribution claims pursuant to CERCLA § 113(b), 42 U.S.C. § 9613(b).

Respondents do not allege that either petitioner itself falls within any of the classes of liable persons identified in CERCLA § 107(a), 42 U.S.C. § 9607(a). Rather, respondents' claims against petitioners are based solely on the actions of other entities from which petitioners had purchased assets, after the site had closed but prior to this litigation. Respondents contend that petitioners are liable for the actions of the asset sellers under a theory of "successor liability," grounded solely in "federal common law."

The district court granted petitioners summary judgment on the successor liability issue. The court applied the traditional state law rule that asset purchasers take free of their sellers' liabilities, and the traditional "mere continuation" exception, under which a purchaser can be liable for the seller's actions only when there is an "identity of officers, directors or shareholders between the two corporations." Pet. App. 67a.

As to petitioner NRS Carting Company, Inc., the district court granted summary judgment because the requisite identity was not present, "and for the further reason that [NRS] has shown, without contradiction, that it

came into existence after the disposal by Norwalk Service, Inc., and only purchased limited assets of Norwalk Service, Inc." *Id.* at 79a.

As to petitioner Zollo Drum Company, Inc., since "[s]tock ownership, officerships and directors [of the asset seller and of Zollo] have not * * * been put into the record," *id.* at 82a, the court granted Zollo's summary judgment motion, "[a]s a distinct entity is involved." *Id.*

The Second Circuit reversed. The court of appeals decided, in a single sentence, that federal common law, rather than state law, should govern the successor liability determination:

> A number of courts have recognized the importance of national uniformity and applied traditional rules of successor liability, rather than the successor liability law of a given state.

Pet. App. 20a-21a. The court acknowledged that this ruling was in direct conflict with *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991). Pet. App. 21a.

The court of appeals then considered what *the content* of its federal common law successor liability rule should be. The court recognized that traditional state law generally protects an asset purchaser from the seller's liabilities, subject to limited exceptions. Pet. App. 21a. The court also acknowledged that the traditional "mere continuation" exception "requires the existence of a single corporation after the transfer of assets, with an identity of stock, stockholders, and directors between the successor and predecessor corporations." *Id.*

Ironically, after deciding to create federal common law on the basis that "courts have recognized the importance of national uniformity and applied traditional rules of successor liability," the Second Circuit specifically rejected the traditional rules of successor liability applied in most States, and applied instead a liberalized "substantial

continuity" test for successor liability. Under this more fluid formulation, the bright line "mere continuation" exception is replaced by a tabulation of factors: the court asks "if the successor maintains the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produces the same products for the same customers." Pet. App. 21a.

The court of appeals concluded that the "substantial continuity" test was "more consistent" with CERCLA's "primary goals" than "the older and more inflexible 'identity' rule" applied in most States. Pet. App. 22a. The court characterized CERCLA's "overall purpose" as "holding responsible parties liable for cleanup costs." *Id.* at 20a. Beyond this very general (and in application, circular) principle, the court's opinion does not identify any *specific* objective of the statute which would be frustrated by the application of traditional state successor liability law. Evidently, the court of appeals concluded that its liberalized federal common law test was "superior" to "the older and more inflexible" state law rule because more parties would be held liable under a more expansive standard.

While a petition for rehearing was pending, this Court decided *Atherton v. FDIC*, 117 S. Ct. 666 (1997). *Atherton* unanimously reaffirmed this Court's core teachings that creation of federal common law is justified only in a "few and restricted" situations where a "significant conflict" between state law and federal policies is "specifically shown." *Id.* at 670. General claims of a "need for 'uniformity' " do not satisfy this demanding standard. *Id.* at 671.

The court of appeals denied rehearing in a brief *per curiam* opinion, written "to clarify our prior opinion." Pet. App. 86a. In its supplemental opinion, the court acknowledged that under *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) (which it had not previously cited),

"a mere federal interest in uniformity is insufficient to justify displacing state law in favor of a federal common law rule." Pet. App. 86a. Nevertheless, the court said that its prior opinion had not relied principally on a "need for uniformity" to justify creating federal common law. Rather, "our primary reason for adopting a federal common law rule was our concern that allowing state law rules such as the inflexible and easily evaded 'identity' rule to control the question of successor liability would defeat the goals of CERCLA." *Id.* at 86a-87a. The Second Circuit also concluded, for the first time, that each of the factors in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), favored its result:

> Each of the *Kimbell Foods* factors supports our decision—there is a significant need for a uniform rule, allowing lenient state law rules to control would defeat federal policy, and we perceive no danger that our decision to adopt a federal rule of "substantial continuity" will unduly upset existing corporate relationships.

Pet. App. 87a.

REASONS FOR GRANTING THE PETITION

The central issue in this case is whether the federal courts are justified in creating federal common law rules of successor liability applicable solely to CERCLA actions, thereby preempting generally applicable, established rules of state corporation law. The Second Circuit held that it was proper to create federal common law, based on its view of "the importance of national uniformity" in CERCLA actions, and its concern that the "inflexible and easily evaded" successor liability rule prevailing in most States would frustrate CERCLA's overall purpose of "holding responsible parties liable for cleanup costs." The Second Circuit also held that the federal common law rule should be a liberalized "substantial continuity" test, and not the traditional rule of nonliability for asset purchasers applied in almost every State.

The Second Circuit's rulings warrant review by this Court for several reasons.

First, the Second Circuit's decision conflicts with decisions of the First, Fifth, Sixth and Eleventh Circuits. Each of those courts has applied state law to determine the CERCLA liability of state-created business organizations and their owners, and has refused to create federal common law to supplement or preempt the traditional state law rules. In total, eight courts of appeals are evenly divided as to the propriety of creating federal common law under CERCLA. Review by this Court is needed to resolve this deep-seated circuit conflict.

Second, the Second Circuit's decision to create federal common law ignores this Court's repeated admonitions that federal common law may displace state corporation law only in truly extraordinary circumstances where necessary to protect specific, identifiable, congressionally adopted policies. Moreover, in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), this Court emphatically rejected each of the specific rationales on which the Second Circuit relied to justify creating federal common law under CERCLA. The Second Circuit is the only court of appeals to create federal common law under CERCLA in *O'Melveny*'s wake.

Third, review is warranted because of the conflicts among the lower courts which have purported to adopt "nationally uniform," federal common law rules of CERCLA successor liability. It is ironic that, under the banner of "national uniformity," these courts have created such a balkanized, conflicting set of decisions, varying from circuit to circuit, district to district, and in some instances even within individual districts. This confusion is inherent in the unfocussed, malleable standards these courts have adopted, and in the fact that little more than the "polluter pays" slogan guides these courts' wholesale rewriting of the Nation's corporate laws. The disarray

in the federal common law decisions stands in marked contrast to the general uniformity of the law in the several States concerning successor liability issues. As a result of the confusion spawned by the federal common law decisions, it is simply impossible for business entities and their counsel to predict with any certainty how successor liability and related corporate law issues will be resolved under CERCLA.

Fourth, the question presented is important and recurring. Successor liability and related issues arise frequently in Superfund cases. Individual CERCLA cases typically allocate massive liabilities, and involve primary conduct of private parties which occurred years before CERCLA's enactment, and long before the rise of a federal common law of successor liability. Given the frequency with which CERCLA successor liability issues arise, the number of Superfund cases currently being litigated and the amount at stake in such cases, and the importance of certainty to the success of the Superfund program, the confusion engendered by the conflicts in the lower courts should not be permitted to continue.

Moreover, the question whether a proposed asset acquisition carries with it significant potential liability is a matter that directly affects the negotiation and structure of numerous transactions. It is therefore vital that the Court resolve the question presented concerning the nature and source of successor liability so that corporations in performing due diligence can make informed decisions whether to enter certain transactions and, if so, how to structure them.

I. THE SECOND CIRCUIT'S CREATION OF FEDERAL COMMON LAW TO OVERRIDE STATE LAW UNDER CERCLA CONFLICTS WITH DECISIONS OF THE FIRST, FIFTH, SIXTH AND ELEVENTH CIRCUITS, AND AGGRAVATES A CONFLICT WHICH HAS EVENLY DIVIDED EIGHT COURTS OF APPEALS.

A. The Second Circuit's decision to fashion federal common law rules of CERCLA successor liability is consistent with the decisions of three other courts of appeals in pre-*O'Melveny* cases.[1] However, as the court conceded, its decision conflicts with *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991), which held that state law governs successor liability under CERCLA. Pet. App. 21a. The Sixth Circuit reaffirmed *Anspec* in *City Management Corp. v. U.S. Chemical Co.*, 43 F.3d 244, 250 (1994). The Second Circuit failed to recognize, however, that its decision also conflicts with *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401 (1st Cir. 1993), a CERCLA action involving a Massachusetts site, which applied the successor liability rule from an earlier Massachusetts diversity case. *Id.* at 408-09 (following *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 692 (1st Cir. 1984)).

But the conflict among the courts of appeals is not limited to the successor liability issue-proper. Other courts of appeals have refused to create federal common law in closely related areas concerning the CERCLA liabilities of state-created business organizations and their owners, and have instead applied traditional, well-established state

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[1] *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992); *Louisiana-Pac. Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1263 (9th Cir. 1990); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91-92 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989). The Ninth Circuit recently heard oral arguments in a case raising the issue whether *Louisiana-Pacific v. Asarco* remains goods law after *O'Melveny*. *Atchison, T. & S.F. Ry. Co. v. Brown & Bryant, Inc.*, No. 96-15529 (9th Cir. argued May 8, 1997).

corporation law. Both the Fifth and Sixth Circuits have refused to create federal common law to expand the CERCLA liability of parent corporations beyond the liability imposed under state law governing piercing the corporate veil. *United States v. Cordova Chem. Co.*, 113 F.3d 572, 579-80 (6th Cir. May 13, 1995) (*en banc*); *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991).[2] The Eleventh Circuit has applied state law, rather than federal common law, to determine whether limited partners are responsible for a limited partnership's CERCLA liabilities. *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1501-02 (11th Cir. 1996). *See also Citizens Elec. Corp. v. Bituminous Fire & Cas. Co.*, 68 F.3d 1016, 1019 (7th Cir. 1995) (Easterbrook, J.) (dictum; under *O'Melveny* and *Kimbell Foods*, resort to state law "would be particularly appropriate" to decide capacity of dissolved corporation to sue or be sued under CERCLA).

Decisions relying upon state law stress that creation of federal common law rules to displace state law "would dramatically alter traditional concepts of corporation law," and in particular the bedrock corporate law principles of limited liability and the separateness of corporate entities. *Joslyn Mfg.*, 893 F.2d at 82-83. These decisions also recognize that each of the factors identified in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-29

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[2] Other circuits have created federal common law rules, and have expanded a parent corporation's responsibility for its subsidiary's CERCLA liabilities beyond the circumstances in which state law would hold the parent liable. *See Schiavone v. Pearce*, 79 F.3d 248, 254 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993) ("Congress has expanded the circumstances under which a corporation may be held liable for the acts of an affiliated corporation such that * * * traditional rules of limited liability for corporations do not apply."); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991).

(1979), favors the application of state law to determine the CERCLA liabilities of state-created business entities. *First*, no federal policy requires the creation of a uniform body of federal law, particularly because state law on these issues is largely uniform.[3] *Second*, application of state law would not frustrate any *specific* policy objective of CERCLA.[4] *Third*, the *ad hoc* creation of federal common law would frustrate the expectations of private parties who had structured transactions in reliance on state law:

> Private parties have relied on state corporation law when making corporate acquisitions and in forming and dissolving corporations. The prices paid by the buyers to the sellers in those transactions undoubtedly reflected, in part, the parties' understanding concerning who retained the seller's liabilities.

Anspec, 922 F.2d at 1250 (concurring opinion).[5] *Finally*, reliance upon federal common law would create massive uncertainties for *future* transactions, because, unlike state law which has "evolved over decades," "at least in the near term, there is no established body of federal common law on the issues presented in this case." *Id.* at 1251 (concurring opinion). *See also, Cordova Chem.*, 113 F.3d at 579-80 (refusing to abandon state

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[3] *Redwing Carriers*, 94 F.3d at 1501; *Anspec*, 922 F.2d at 1249 (concurring opinion) (noting that the United States, as *amicus*, had acknowledged that state law on successor liability is largely uniform).

[4] *Redwing Carriers*, 94 F.3d at 1502 (application of state law would not "permit action prohibited by the Act"); *Anspec*, 922 F.2d at 1249-51 (concurring opinion); *Joslyn Mfg.*, 893 F.2d at 83 (there is no indication in CERCLA of congressional intent to displace state corporation law).

[5] *See also, Redwing Carriers*, 94 F.3d at 1502 ("Given the popularity of the limited partnership structure as a means of organizing businesses and attracting investment in this country, we hesitate to upset the expectations investors have under current state law by adopting a federal common law rule.").

law of piercing the corporate veil in favor of "a nebulous 'control' test" grounded in federal common law).

These decisions' careful weighing of the *Kimbell Foods* factors, and their recognition of a strong presumption favoring the application of established state law, squarely conflict with the Second Circuit's cursory analysis in this case. The conflict in the circuits warrants review by this Court.

B. Besides being contrary to the decisions of four courts of appeals, the Second Circuit's decision to create a federal common law of successor liability conflicts with decisions of this Court.

As the analysis of the better reasoned opinions in the lower courts reveals, reliance on federal common law in this context is inconsistent with all three parts of the test established by this Court in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979).

Since *Kimbell Foods*, this Court has emphasized that the presumption in favor of applying state law

> is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state law standards. * * * *Corporation law is one such area.*

Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98 (1991) (emphasis added).[6]

In *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), this Court specifically rejected every reason the Second Circuit, and the other circuits adopting federal common law, have offered to justify creating a federal common law rule of CERCLA successor liability. These courts

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[6] *See also, Burks v. Lasker*, 441 U.S. 471, 478 (1979) ("Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute.").

first argue that federal common law is required by the "importance of national uniformity" to the CERCLA program.[7] Second, they reason that application of state law "would result in greater expense to the taxpayer, which is contrary to CERCLA's purposes." [8] Finally, they express the normative judgments that state law is "inflexible", Pet. App. 22a, and "unduly restrictive," [9] and that "even legitimate resort to state law" could permit "evasion" of a corporation's rightful CERCLA liability.[10]

None of these rationales survives *O'Melveny*. Like this case, *O'Melveny* arose in a context in which lower courts had developed expansive, federal common law rules to address a perceived national emergency threatening a tax-financed insurance fund. This Court in *O'Melveny* held that, while it might simplify litigation under federal statutes, a generalized interest in "national uniformity" cannot justify creating federal common law rules which do not govern the primary conduct of the federal government, but simply affect the United States' rights "with respect to primary conduct of private actors that has already occurred." 512 U.S. at 88.[11] *O'Melveny* rejected the "more money" argument that federal common law rules would improve the government's ability to recoup expenditures from a tax-financed insurance fund, because

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[7] Pet. App. 20a. *See also, Carolina Transformer*, 978 F.2d at 837; *Louisiana-Pac.*, 909 F.2d at 1263 n.2; *Smith Land*, 851 F.2d at 92.

[8] *Louisiana-Pac.*, 909 F.2d at 1263 n.2. *See also, Smith Land*, 851 F.2d at 91-92.

[9] *Smith Land*, 851 F.2d at 92; *see also Louisiana-Pac.*, 909 F.2d at 1263 n.2.

[10] *Carolina Transformer*, 978 F.2d at 837. *See also*, Pet. App. 87a (state law "easily evaded").

[11] *See also, e.g., Atherton v. FDIC*, 117 S. Ct. 666, 671 (1997) ("To invoke the concept of 'uniformity,' however, is not to prove its need."); *Kimbell Foods*, 440 U.S. at 730 (rejecting "generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect [federal interests]").

"there is no federal policy that the fund should always win." *Id.* at 88. Finally, *O'Melveny* rejected outright the "facile" argument that "it would 'disserve the federal program' " to apply state laws, and counseled the lower courts to refrain from making normative judgments about the wisdom of state laws. *Id.* at 89.

O'Melveny establishes that there is no basis for creating a federal common law of corporations under CERCLA. Yet the Second Circuit has begun fashioning an *ad hoc* body of judge-made, federal corporate law from whole cloth, with little more than the "polluter pays" slogan to guide it. The court's decision relies on court of appeals decisions which predate, and have been superseded by, *O'Melveny*, and on arguments which *O'Melveny* specifically rejected just three years ago. This Court should grant the petition to reject this approach.

II. THE CONFUSED STATE OF EXISTING LAW IN THE LOWER COURTS HAS CREATED AN UNACCEPTABLE DEGREE OF UNCERTAINTY.

A. The lower courts that have chosen to create federal common law under CERCLA are in disarray as to the proper content of the federal common law rule of successor liability. This confusion provides an independent justification for granting certiorari.

While purporting to champion the cause of "national uniformity," the courts which have adopted federal common law standards of successor liability in CERCLA cases cannot agree among themselves as to the content of the supposedly "uniform" federal rule. "This confusion underscores the inevitable difficulty that arises when courts attempt to erect new concepts of corporate liability within the framework of CERCLA in the absence of direction from Congress." *United States v. Cordova Chem. Co.*, 113 F.3d 572, 579 (6th Cir. May 13, 1997) (*en banc*).

Disagreements about the content of federal common law in CERCLA cases are legion. For instance, whether

a continuity of ownership between the asset purchaser and seller is necessary, or even relevant, to the "substantial continuity" analysis has badly divided the lower courts.[12] The lower courts also disagree whether the "substantial continuity" test requires that the asset purchaser continue the line of business which gave rise to the seller's CERCLA liability.[12] Similarly, the courts are split as

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[12] *Compare United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 488 n.10 (8th Cir. 1992) ("The test considers an identity of stock, stockholders, and officers, but not determinatively."); *Hunt's Generator Comm. v. Babcock & Wilcox Co.*, 863 F. Supp. 879, 884 (E.D. Wis. 1994) (despite continuity of management, employees, production facilities, product and customers, refusing to find "substantial continuity" based in large part on lack of overlapping ownership between asset seller and buyer); *and The Ekotek Site PRP Comm. v. Self*, 948 F. Supp. 994, 1001 (D. Utah 1996) (same); *with United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992) (widely cited 8-factor "substantial continuity" test does not include common ownership); *Northwestern Mut. Life Ins. Co. v. Atlantic Research Corp.*, 847 F. Supp. 389, 399-400 (E.D. Va. 1994) (finding "substantial continuity" despite lack of common ownership between asset purchaser and seller); *Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1289 (E.D. Pa. 1994) (same); *Gould, Inc. v. A&M Battery & Tire Serv.*, 950 F. Supp. 653, 661 (M.D. Pa. 1997) (same).

On a related point, courts in the Eastern District of Pennsylvania disagree whether the purported successor entity must bear a "causal link" to the environmental harm before the "substantial continuity" test is satisfied. *Compare United States v. Atlas Minerals & Chems., Inc.*, 824 F. Supp. 46, 51 (E.D. Pa. 1993) (Cahn, J.) ("causal link" required) *with Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1287 (E.D. Pa. 1994) (Giles, J.) (rejecting "causal link" requirement).

[13] *Compare Louisiana-Pac. Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1265-66 (9th Cir. 1990) (most important fact defeating successor liability that "L-Bar did not continue IMP's slag business"); *and Gould, Inc. v. Alter Metal Co.*, No. 91 C 20371, 1994 WL 406576, at *3 (N.D. Ill. Aug. 1, 1994) (no "continuity of operations" where, unlike seller, asset purchaser engaged in "no purchase and sale of trailer loads of scrap batteries"); *with United States v. Carolina Transformer Co.*, 987 F.2d 832, 840 (4th Cir. 1992) (asset purchaser cannot avoid liability "merely by splitting off the particular part

to whether the asset purchaser's knowledge of the seller's potential CERCLA liability at the time of the asset purchase (1) is a necessary precondition to "substantial continuity" liability,[14] (2) is merely relevant to the determination,[15] or (3) has no bearing whatsoever on the analysis.[16] Decisions within at least two districts are

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of [seller's] operations that resulted in its environmental problems"); *United States v. Keystone Sanitation Co.*, No. 1:CV-93-1482, 1996 U.S. Dist. Lexis 13651, at *8 (M.D. Pa. Aug. 22, 1996) (holding asset purchaser liable despite discontinuance of liability-creating operations); *HRW Systs., Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318, 330-31 & n.11 (D. Md. 1993) (same); *and In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1010, 1015 n.8 (D. Mass. 1989) (same).

[14] *See, e.g., North Shore Gas Co. v. Salomon*, 963 F. Supp. 694, 704 (N.D. Ill. 1997); *State of New York v. Panex Indus., Inc.*, No. 94-CV-0400E(H), 1996 WL 378172, at *8 (W.D.N.Y. June 24, 1996); *Ninth Ave. Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 726 (N.D. Ind. 1996); *Gould, Inc. v. Alter Metal Co.*, 1994 WL 406576, at *3; *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 812 F. Supp. 124, 129 (N.D. Ill. 1993).

[15] *See, e.g., United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 489 (8th Cir. 1992); *Louisiana-Pac. Corp.*, 909 F.2d at 1265 (asset purchaser's lack of notice of seller's CERCLA liabilities one of "[t]wo key facts" supporting non-liability); *The Ekotek Site PRP Comm. v. Self*, 948 F. Supp. 994, 1001 (D. Utah 1996); *Hunt's Generator Comm. v. Babcock & Wilcox Co.*, 863 F. Supp. 879, 884 (E.D. Wis. 1994) (knowledge of liability a "very significant" factor); *Interstate Power Co. v. Kansas City Power & Light Co.*, 909 F. Supp. 1241, 1276 (N.D. Iowa 1993); *Anderson v. City of Minnetonka*, No. CV 3-90-312, 1993 WL 95361, at *8 (D. Minn. Jan. 27, 1993).

[16] *See, e.g., Gould, Inc. v. A&M Battery & Tire Serv.*, 950 F. Supp. 653, 657 (M.D. Pa. 1997); *State of Washington v. United States*, 930 F. Supp. 474, 482 (W.D. Wash. 1996) ("The idea that a successor must have knowledge of a potential for CERCLA liability before liability may attach to it, is illogical considering CERCLA's policies of strict liability and retroactive liability."); *State of Ariz. v. Esco*, No. Civ. 93-0937, 1997 WL 259520, at *2 (D. Ariz. March 26, 1997) (same); *Kleen Laundry & Dry Cleaning Servs. v. Total Waste Mgmt. Corp.*, 867 F. Supp. 1136, 1144 (D.N.H. 1994).

diametrically opposed on this issue.[17] The "knowledge of the liability" issue is critically important in CERCLA cases, because many of the asset sales at issue in these cases occurred before CERCLA was enacted in 1980, when "knowledge of the liability" was impossible.

The disarray among the federal common law decisions creates crippling uncertainty for litigants attempting to assess or resolve their CERCLA liabilities, and for businesses seeking to structure asset-purchase transactions which conform with the prevailing legal standard(s). Absent review by this Court, this confusion and uncertainty will persist for years as the lower courts (in those jurisdictions committed to the federal common law) argue among themselves as to which corporate law rules they prefer.

B. In addition to its other flaws, the Second Circuit's decision conflicts with the very decision of this Court on which it purports to rely. The court of appeals adopted an expansive "substantial continuity" test for successor

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[17] *Compare State of New York v. N. Storonske Cooperage Co.*, 174 B.R. 366, 387 (N.D.N.Y. 1994) (McCurn, J.) (substantial continuity only applies if "the asset purchaser has knowledge of the potential liability and responsibility for that liability" at the time of asset sale); *United States v. Atlas Minerals & Chems., Inc.*, 824 F. Supp. 46, 50 (E.D. Pa. 1993) (Cahn, J.) ("the 'continuity of enterprise' exception is designed to prevent strategic behavior by corporate actors who know of or anticipate CERCLA problems"); *and Elf Atochem N. Am. v. United States*, 908 F. Supp. 275, 283 (E.D. Pa. 1995) (Joyner, J.) ("When a purchaser has no knowledge of potential CERCLA liability, successor liability is rarely found."); *with United States v. Peirce*, Nos. 83-CV-1623, 91-CV-0039, 92-CV-0562, 1995 WL 356017, at *2 (N.D.N.Y. Feb. 21, 1995) (McAvoy, J.) (knowledge of liability "not [a] determinative factor[] in deciding whether to apply the 'continuity of enterprise' theory"); *and Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1287 n.26 (E.D. Pa. 1994) (Giles, J.) (rejecting view that knowledge of liability necessary, but suggesting a constructive knowledge requirement, whereby liability would only be imposed if "purchaser * * * should have known after reasonable investigation of the seller's potential liability").

liability, rather than the stricter standard prevailing in most States, largely because "[t]he Supreme Court has followed this approach in the labor law context." Pet. App. 21a (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987)). But *Fall River* used a "substantial continuity" analysis solely to determine whether a new employer was required to recognize the bargaining unit of a former employer from whom the new employer purchased assets. *Id.* at 41. *Fall River* emphasized that it was not formulating a rule of successor *liability* at all: "although the successor has an obligation to bargain with the union [if it satisfies the 'substantial continuity' test], * * * *it is not bound by the substantive provisions of the predecessor's collective-bargaining agreement.*" *Id.* at 40 (emphasis added).

In *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249 (1974), this Court explained this point further. *Howard Johnson* held that a new employer is "subject to all the legal and contractual obligations of the predecessor" *only* if the new employer constitutes the predecessor's "alter ego." *Id.* at 260-61 n.5. "Such cases involve a mere technical change in the structure or identity of the employing entity, * * * *without any substantial change in its ownership or management.*" *Id.* (emphasis added), citing *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942) ("a true change of ownership * * * would terminate the duty of reinstatement created by the Board's order").[18]

This Court's labor law decisions, unlike the Second Circuit's decision in this case, impose successor *liability*

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[18] The lower courts have recognized that, under this Court's labor cases, successor *liability* can only be imposed if the new employer meets the "alter ego" standard; *Fall River*'s "substantial continuity" analysis is irrelevant to this issue. *See, e.g., NLRB v. Hospital San Rafael, Inc.*, 42 F.3d 45, 50 (1st Cir. 1994), *cert. denied*, 116 S. Ct. 331 (1995); *Southward v. South Central Ready Mix Supply Corp.*, 7 F.3d 487, 493 (6th Cir. 1993); *NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331, 336 n.6 (6th Cir. 1990).

on an asset purchaser *only* if the purchaser satisfies an "alter ego" test functionally identical to the "mere continuation" exception prevailing in most States.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

The Second Circuit's decision concerns issues which are frequently litigated under a federal program of primary importance. Because of the retroactive application of the statute, CERCLA litigation often involves waste disposal which occurred decades earlier. Businesses frequently have undergone reorganizations or transformations (including mergers, asset sales, and dissolutions) in the interim. For these reasons, the extent of the liability of corporations and other state-created business entities and their owners frequently arises in CERCLA lawsuits.

This case is typical: it concerns a landfill which closed in 1979, and of approximately 200 parties respondents sued, the case against at least 7 depends on the resolution of successor liability issues.[19] A recent computer search revealed eight appellate opinions, and over 60 reported district court decisions, addressing successor liability issues under CERCLA. It is no exaggeration to say that thousands of parties at hundreds of Superfund sites are affected by the issues raised by this petition.

The nature of Superfund liabilities adds further importance to the petition. The average cost of site remediation at the Nation's Superfund sites was recently estimated to be between $25 and $30 million.[20] It is simply intolerable that such a high degree of uncertainty prevails concerning

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[19] In addition to petitioners, the district court resolved successor liability issues involving Axil Corp. (*see* Pet. App. 66a-67a), Connecticut Pharmacare, Inc. (*id.* at 68a), Sanitary Refuse, Inc. (*id.* at 69a-70a), Jacob Brothers, Inc. (*id.* at 72a), and Seymour Brass, Inc. (*id.* at 80a).

[20] The Business Roundtable, *101 Terms and Facts on Superfund*, at 3 (Nov. 1993).

the basic legal standards that govern these massive liabilities.

The court's decision to create federal common law implicates issues of judicial restraint, federalism, and the separation of powers. The decision whether to adopt federal-judge-made rules to preempt state law raises quasi-jurisdictional issues concerning the proper (and properly limited) law-making power of the federal courts, and concerning the appropriate division of authority between federal and state governments and between the judicial and legislative branches of the federal government.[21] The impropriety of judicial lawmaking is heightened here, where States have adopted a general rule of nonliability for asset purchasers based on their weighing of the competing interests in preserving the responsibility of true successors—that is, mere continuations of the asset seller in another form—against the goal of promoting the free transferability of assets. *Cf. O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994) (stressing competing policy considerations which must be weighed in developing rules of legal malpractice).

Besides their importance to administration of the CERCLA program, the issue here is important to the business community. Because of the unsettled state of federal common law in different circuits, different districts, and even within individual districts, the parties negotiating

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[21] *See generally, Atherton v. FDIC*, 117 S. Ct. 666, 670 (1997) ("Whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts."); *O'Melveny*, 512 U.S. at 89 ("Within the federal system, at least, we have decided that th[e] function of weighing and appraising [policy considerations] 'is more appropriately for those who write the laws, rather than for those who interpret them.' "; citation omitted); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981) (federal courts, "unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers"); *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981).

and structuring asset-purchase transactions cannot know with any certainty what the "federal common law," as interpreted in a particular district or circuit, will require, and how that law may differ from the state common law that will continue to govern all other aspects of the transaction. *Ad hoc* creation of federal common law injects debilitating uncertainty into these common commercial transactions. This Court alone can remedy this problem and it should do so here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 23, 1997

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 1268, 1269, 1270, 1271—August Term 1995

(Argued March 13, 1996 Decided Nov. 1, 1996)

Docket Nos. 95-6074, 95-6088, 95-6090, 95-6098

B.F. GOODRICH; UPJOHN COMPANY; DOW CORNING CORPORATION; ENVIRONMENTAL WASTE RESOURCES, INC.; REYNOLDS ALUMINUM BUILDING PRODUCTS COMPANY; UNIROYAL CHEMICAL CO., INC.; WHITE CONSOLIDATED INDUSTRIES; KERITE COMPANY; UNISYS CORPORATION; RISDON CORP.; HOECHST CELANESE CORPORATION; CADBURY BEVERAGES, INC.; COLTEC INDUSTRIES, INC.; KEN-CHAS RESERVE CO.; UNITED STATES OF AMERICA; STATE OF CONNECTICUT; NAUGATUCK GLASS CO.; NAUGATUCK TREATMENT CO.,

Plaintiffs-Appellants,

v.

JOHN BETKOSKI; GEORGE CLARK; ARMSTRONG RUBBER COMPANY; THOMAS ASHMORE; BOROUGH OF NAUGATUCK; BRISTOL FLOWED GASKET COMPANY; CONNECTICUT RESOURCES RECOVERY AUTHORITY; DEE'S, INC., also known as Dee's Refuse, Inc.; DERBY TIRE COMPANY; EASTERN COMPANY; GENERAL ROOFING & SHEET METAL CO., INC.; GERALD METALS, INC.; C.R. GIBSON COMPANY; HOSPITAL MARKETING SERVICES CO., INC.; IDEAL MANUFACTURING CO.; JACOB BROTHERS, INC.; LITTON SYSTEMS, INC., also known as Winchester Electronics; MANAFORT BROTHERS, INC.; NASCO, INC.; NEW HAVEN HOUSING AUTHORITY; NORTHEAST UTILI-

TIES; FRANK PERROTTI & SONS, INC.; QUALITY RUBBER CO.; SANITARY REFUSE CO., INC.; SEYMOUR BRASS TURNING CO.; SPERRY RAND CORPORATION; STAUFFER CHEMICAL COMPANY; TOWN OF MIDDLEBURY; TOWN OF THOMASTON; TOWN OF WOODBURY; TRIANGLE INDUSTRIES, INC.; TURNER CONSTRUCTION COMPANY; U.S. PROLAM, INC.; WATERBURY COMPANIES, INC.; WATERTOWN HOUSING AUTHORITY; ZOLLO DRUM COMPANY, INC.; ATLANTIC RICHFIELD CO.; ADAM'S SERVICE STATION; ARMAND'S AUTO SERVICE; HIGH RIDGE APARTMENTS; ASHMORE TRUCKING; BEACON OUTING CLUB; BOISE CASCADE CORPORATION; BRASS RAIL RESTAURANT; COFFEE SHOP; CRELAN CONSTR. CO.; CT. SHEET METAL/WOOD CO.; DADDIO'S; DAVID RUPSIS; EDWARD BETOWSKI; ELK'S LODGE # 967; GEORGE'S FLOOR COVERING; HORIZON HOMES; KORVETTE SERVICES; LATELLA CARTING CO.; LOMBARD BROS., INC.; LONG MEADOW CAFE; MCDONALD'S RESTAURANT; MEYERS & SCHWARTZ; NEAL'S COFFEE SHOPPE; NELSON MENDES; PORTANOVA TRUCKING CO.; PORTUGUESE CLUB; RAY'S HARDWARE; SHORE'S AUTO PARTS; STEVE'S TIRES; STOP & SHOP; TRIANGLE SERVICES; TROWBRIDGE APTS.; VALLEY MOTOR TRAILER SALES; VALLEY MOBILE HOMES PARK; VIEIRA AGENCY; WATERBURY PRESSED METALS; TOWN OF BETHANY; CITY OF WATERBURY; CAPOZZIELLO BROTHERS; TOWN OF KILLINGWORTH; TOWN OF BEACON FALLS; NAUGATUCK Y.M.C.A.; E. ERIC ARSAN REFUSE; JOHN ASHMORE; JOSEPH BETKOSKI; CONNECTICUT PHARMACARE, INC., doing business as Ford Pharmacy; FIRST NATIONAL SUPERMARKETS, INC.; P. FRANCINI COMPANY; TOWN OF HAMDEN; JETZON TIRE CO.; CITY OF MILFORD; NRS CARTING CO., INC.; TOWN OF ORANGE; PETER PAUL CADBURY; TOWN OF PLYMOUTH; TOWN OF SEYMOUR; TOWN OF STRATFORD; TOWN OF WATERTOWN; TOWN OF WESTPORT,

Defendants-Appellees.

Before:

CARDAMONE, WALKER, and MCLAUGHLIN,
Circuit Judges.

CARDAMONE, *Circuit Judge*:

This appeal, arising originally from the disposal of hazardous substances at two Connecticut landfills, Beacon Heights and Laurel Park, requires us to determine whether defendants accused of generating and transporting hazardous substances deposited at the two landfill sites might be liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to contribute to the costs of cleaning up the sites. Under CERCLA, several classes of responsible parties are liable for most costs incurred in responding to and remediating sites where hazardous substances are found. We must, in addition, decide if certain parties remain susceptible to suit by the United States and the State of Connecticut for response costs incurred by these governments.

Plaintiffs-appellants the United States the State of Connecticut, the Beacon Heights Coalition, and the Laurel Park Coalition appeal from a judgment entered May 2, 1995 by the United States District Court for the District of Conecticut (Dorsey, C.J). The court granted judgment on the pleadings against the United States and Connecticut and granted summary judgment against the Beacon Heights Coalition and the Laurel Park Coalition and in favor of nearly 100 defendants alleged in plaintiffs' complaints to be potentially responsible parties in an action under CERCLA, 42 U.S.C. §§ 9601-9675, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

The Beacon Heights and Laurel Park Coalitions are groups of industrial waste generators that sought contribution from third parties after having settled their liability

with the United States, the State of Connecticut, and the Murthas and affiliated entities—the owners/operators of the two landfill sites. The Laurel Park Coalition sought initially to add 1151 other potentially responsible parties to the litigation. The district court ground away at this number slowly, yet it "ground exceeding small." Insisting that these plaintiffs only implead those parties against whom they had a claim that was both legally and factually substantiated, the district court reduced to 41 the 1151 third party defendants that these plaintiffs moved to add, thus eliminating over 1000 potential parties from the suit.

Later, with motions for summary judgment before it, the district court construed some of CERCLA's basic provisions in a manner inconsistent with our precedents and, ruling that the coalitions had failed to advance sufficient proof, thereby was able to grant summary judgment to nearly all of the roughly 100 defendants, dismissing plaintiffs' complaints against them. The district court also found that both governments had been fully reimbursed by the industrial coalitions and the landfills' owners and therefore granted summary judgment against these governments.

BACKGROUND

We assume the reader's familiarity with our previous decision in this case, *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992) (*Murtha I*), and with the published decisions of the district court relevant to this appeal. *See B.F. Goodrich Co. v. Murtha*, 815 F. Supp. 539 (D. Conn. 1993) (*Murtha II*); *B.F. Goodrich Co. v. Murtha*, 840 F. Supp. 180 (D. Conn. 1993) (*Murtha III*); *B.F. Goodrich Co. v. Murtha*, 855 F. Supp. 545 (D. Conn. 1994) (*Murtha IV*). We detail only those background facts necessary to an understanding of this appeal. Those facts relevant to the discussion of a specific issue and necessary to its disposition will be included in the analysis.

A. *Initial Litigation*

The Beacon Heights and Laurel Park landfills have both been designated as Superfund sites by the Environmental Protection Agency (EPA). Terrance and Harold Murtha, and several corporations controlled by them (collectively, Murtha), owned and operated Laurel Park from 1961 until 1987, and owned and operated Beacon Heights from 1970 to 1987. In 1987 Murtha was sued in separate actions by the EPA, the State of Connecticut's Department of Environmental Protection (DEP), Uniroyal Chemical Company, Inc., and a coalition of corporations led by B.F. Goodrich Company. Murtha filed third party actions for contribution or indemnification against some 200 third party defendants. These parties were accused either of generating or of transporting hazardous substances to the landfills. Most of the defendants named in the Murtha third party suits were not named by the EPA as potentially responsible parties. *Murtha I*, 958 F.2d at 1196.

In September 1987, when the Murtha litigation began, the EPA entered into a consent decree concerning the remediation of Beacon Heights with 33 potentially responsible parties who may have generated hazardous substances that were later deposited in that landfill. These parties, later known as the Beacon Heights Coalition,[1] agreed to undertake the remediation of that site and to reimburse the government for its future oversight costs in excess of $500,000. Since this coalition did not provide for past costs or for those future response costs unrelated to oversight, the EPA sued several non-settling potentially responsible parties[2] in a separate action to recover its past and future remediation costs.

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[1] The Beacon Heights Coalition is today composed of seven members: B.F. Goodrich Co.; Dow Corning Corp.; Hoechst Celanese Corp.; Reynolds Aluminum Building Products Co.; Uniroyal Chemical Company, Inc.; Upjohn Co.; and White Consolidated Industries.

[2] These non-settling parties at Beacon Heights are: Armstrong Rubber Co.; The Eastern Co.; Kerite, Inc.; Primerica, Inc.; Richard Zollo; John Betkoski; Joseph Betkoski; and George Clark.

The EPA also filed two lawsuits concerning the costs of remediating the Laurel Park landfill. One led to a settlement with another industrial coalition of various potentially responsible parties, now known as the Laurel Park Coalition.[3] In an August 1992 consent decree, the Laurel Park Coalition agreed to perform remediation at the site, pay for the government's future oversight costs in excess of $200,000, and pay the EPA $500,000 for its past response costs. The EPA then sued, as it did in the Beacon Heights case, the non-settling potentially responsible parties to recover past costs and future response costs not addressed by the consent decree. The State of Connecticut, which is also involved in the Laurel Park cleanup, received over $1 million from the coalition for response costs and sued the same non-settling parties for unreimbursed costs.

Murtha also settled its litigation with the United States, with Connecticut, and with the two coalitions (coalitions, plaintiffs, or appellants). The parties embodied their agreement in a consent decree (Murtha consent decree) which also was entered by the district court in August 1992. Murtha resolved its liability at both landfill sites for $5,375,000; this amount was apportioned among several parties. The Beacon Heights Coalition received $1,875,000 and $322,500 was given to the EPA for unreimbursed costs relating to Beacon Heights. Murtha assigned its third party claims to the Beacon Heights Coalition. The EPA also received $625,000 for unreimbursed costs at Laurel Park, as did the State of Connecticut, with the remaning $1,975,000 set aside for remediation at that site. Although the Laurel Park Coalition had not been

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[3] The Laurel Park Coalition members in this appeal are: Cadbury Beverages, Inc.; Coltec Industries, Inc.; Kerite Co.; Naugatuck Glass Co.; Naugatuck Treatment Co.; Risdon Corp.; Ken-Chas Reserve Co.; Uniroyal Chemical Co., Inc.; and Unisys Corp.

[4] The non-settling parties at Laurel Park are: Atlantic Richfield Co.; The Eastern Co.; Gerald Metals, Inc.; and Litton Systems, Inc.

formed when the Murtha consent decree was negotiated, the parties agreed that should an industrial coalition form within 18 months of the entry of Murtha's consent decree, the coalition would receive the funds. Because this condition was met, the Laurel Park Coalition received the $1.975 million set aside by Murtha. *See Murtha III*, 840 F. Supp. at 183.

Many of the third party defendants were municipalities and municipal corporations that generated and collected municipal solid waste. They claimed that CERCLA exempted municipal waste from its coverage and that an exemption for household waste in the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k, was incorporated into CERCLA. The district court rejected these arguments, *B.F. Goodrich Co. v. Murtha*, 754 F. Supp. 960 (D. Conn. 1991), and we affirmed, *Murtha I*, 958 F.2d at 1197. The municipal generators therefore remained in the case as named defendants and potentially responsible parties.

B. *Summary Judgment Decisions*

The Beacon Heights Coalition was already armed with Murtha's assignment of its third party claims against generators and transporters of hazardous substances. The Laurel Park Coalition then moved to add to the action as third party defendants 1151 potentially responsible parties. The district court granted the motion to the extent of allowing 41 parties to be joined, but denied it as to the 1110 other potential parties. *Murtha II*, 815 F. Supp. at 546-61.

In April 1992, approximately six weeks after we rejected the municipal defendants' claim of CERCLA exemption, the district court decided *sua sponte* to permit parties to file motions for summary judgment. Nearly all of the original third party defendants filed such motions. Both coalitions opposed the motions and in turn cross-moved for the same relief. *Murtha III*, 840 F. Supp. at 183.

With dispositive motions before the trial court, the two coalitions become increasingly concerned about their ability to present evidence in support of their contentions that the third party defendants had generated or transported hazardous substances to the landfills. Throughout the proceedings in the trial court, discovery had been limited (independently and through a special master). Uniform discovery orders and case management orders effectively restricted discovery to a set of court-drafted interrogatories. The special master assured the coalitions on several occasions that additional discovery would be permitted. After initially denying the coalitions' request for expanded discovery, the district court in December 1992 allowed some limited deposition discovery. Summary judgment motions were submitted to the court and decided in a series of orders, beginning in December 1993. *See Murtha III*, 840 F. Supp. at 183-191.

Summary judgment was eventually granted to every third party defendant-appellee that had moved for such relief, *id.*, and the district court subsequently dismissed *sua sponte* nearly all the remaining third party defendants, including many that did not move for that relief. Of the 88 defendants sued by the coalitions who had not entered into settlement agreements, all but four were dismissed.

Judgment on the pleadings was entered against the United States and the State of Connecticut in their suits against non-settling potentially responsible parties. *Murtha IV*, 855 F. Supp. at 549. The district court reasoned that the EPA and DEP had presented no figures for incurred response costs that were not covered by the $3,500,000 net Murtha settlement, *id.* at 546, and therefore dismissed both government's claims for additional reimbursement. It also granted summary judgment in favor of the remaining three of the eight defendants at Beacon Heights sued by the EPA.

From an amended judgment entered May 2, 1995, the United States, the State of Connecticut, and both coali-

tions appeal. We affirm in part, reverse in part, and remand for further proceedings.

DISCUSSION

The coalitions point to a number of reasons calling for reversal. They contend the district court granted summary judgment to many of the defendants based on a misapplication of substantive CERCLA law, and that instead their cross-motions for summary judgment should have been granted. They also maintain that procedural errors were committed that require reversal.

The trial court's initial decision, *Murtha II*, 815 F. Supp. 539, laid down several broad legal rules, which the court applied, occasionally by reference, in deciding subsequent cases. *See Murtha III*, 840 F. Supp. at 183 ("Many comments on the evidence in [*Murtha II*] are pertinent to the present motions and will not be repeated here."). We address first the coalitions' assertion that the district court incorrectly interpreted CERCLA; second, we consider the coalitions' procedural contentions; third, we review *de novo* the grants of summary judgment in 85 individual cases (with reference to an appendix incorporated in this opinion); and, finally, we address the appeals of the United States and the State of Connecticut.

I. The Law of CERCLA

A. *Basic Principles*

Our construction of CERCLA does not begin with this case. Rather, we are guided by previous writings on this subject in this and other Circuits. CERCLA is a "broad remedial statute," *Murtha I*, 958 F.2d at 1197, and was enacted with the purpose of "[f]irst, assuring that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." S. Rep. 848, 96th Cong., 2d Sess. 13 (1980) (Senate Report), *reprinted in* 1 Senate Comm. on Env't and Pub.

Works, Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund), at 305, 320 (1983) (Leg. Hist.). As a remedial statute, CERCLA should be construed liberally to give effect to its purposes. *Schiavone v. Pearce*, 79 F.3d 248, 253 (2d Cir. 1996). These include facilitating efficient responses to environmental harm, holding responsible parties liable for the costs of the cleanup, *see Murtha I*, 958 F.2d at 1198, and encouraging settlements that reduce the inefficient expenditure of public funds on lengthy litigation, *see In Re Cuyahoga Equip. Corp.*, 980 F.2d 110, 119 (2d Cir. 1992).

CERCLA makes four classes of persons liable—(1) present owners and operators of facilities that accepted hazardous substances, (2) past owners and operators of such facilities, (3) generators of hazardous substances, and (4) certain transporters of hazardous substances. 42 U.S.C. § 9607(a). As we have noted, "[t]he Act's broad reach extends liability to all those contributing—from generation through disposal—to the problems caused by hazardous substances." *Murtha I*, 958 F.2d at 1198. Responsible parties are liable for a broad range of remediation expenses, including all costs of removal of the substances not inconsistent with the national contingency plan, other necessary response costs, damages for injury to natural resources, and the cost of health assessments. *See* 42 U.S.C. § 9607(a)(4).

The Act imposes strict liability. Strict liability is intended to make sure that those who "benefit financially from a commercial activity" internalize the environmental costs of the activity as a cost of doing business. Senate Report at 13, Leg. Hist. at 320; *see New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (discussing legislative history). Liability under the Act is joint and several, unless potentially responsible parties can prove that the harm is divisible. *See United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721-22 (2d Cir. 1993); *Murtha I*, 958 F.2d at 1198.

A CERCLA plaintiff establishes a *prima facie* case by proving that (1) the defendant is within one of the four categories of responsible parties enumerated in § 9607(a); (2) the landfill site is a facility as defined in § 9601(9); (3) there is a release or threatened release of hazardous substances at the facility; (4) the plaintiff incurred costs responding to the release or threatened release; and (5) the costs and response actions conform to the national contingency plan. 42 U.S.C. § 9607(a); *Alcan*, 990 F.2d at 719-20; *Murtha I*, 958 F.2d at 1198.

Once a plaintiff makes a *prima facie* showing, a defendant may avoid liability only if it establishes by a preponderance of the evidence that the release or threatened release was caused by an act of God, an act of war, certain acts or omission of third parties other than those with whom the defendant has a contractual relationship, or a combination of these reasons. 42 U.S.C. § 9607(b). If the plaintiff can establish each of the *prima facie* elements on undisputed facts, and the defendant is unable to demonstrate by a preponderance of the evidence that an affirmative defense applies, summary judgment on liability is appropriate. *Alcan*, 990 F.2d at 720. Significantly, it is "*not* required that the [plaintiff] show that a specific defendant's waste caused incurrence of clean-up costs." *Id.* at 721. Because CERCLA imposes strict liability, there is no causation requirement.

"Hazardous substance" is expansively defined to include

> (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (c) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act . . ., (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act . . ., and (F) any imminently

> hazardous chemical substance or mixture with respect to which the [EPA] Administrator has taken action pursuant to section 2606 of Title 15.

42 U.S.C. § 9601(14). Pursuant to subsection (B), the EPA has listed more than 700 hazardous substances in Table 302.4 of 40 C.F.R. §302.4 (1995). We have noted that "[t]he breadth of § 9601(14) cannot be easily escaped, and we have expressly held that '[q]uantity or concentration is not a factor.'" *Alcan*, 990 F.2d at 720 (quoting *Murtha I*, 958 F.2d at 1200). In other words, the Act's definition includes "even minimal amounts of pollution." *Alcan*, 990 F.2d at 720.

These propositions presently govern CERCLA litigation in this Circuit. If a district court grants summary judgment based on an incorrect understanding of CERCLA, we must reverse and remand. *See Keywell Corp. v. Weinstein*, 33 F.3d 159, 163 (2d Cir. 1994) (reviewing decision granting summary judgment includes determining whether district court correctly applied the law).

B. *Analysis of District Court's CERCLA Interpretation*

The coalitions aver that many third party defendants-appellees were granted summary judgment based on an erroneous application of CERCLA and the case law interpreting the statute. We address each claim of error.

1. *Component Parts*

The district court held, in *Murtha II*, 815 F. Supp. at 546, that "[a]bsent a finding by EPA that a particular product warrants classification as a [hazardous substance] . . ., it cannot be found that the product, notwithstanding its constituent elements, is an [hazardous substance] or [hazardous waste]." It later clarified that holding, by explaining that "mere presence of an element, a named [hazardous substance], as a constitutent of a product does not render the product a [hazardous substance]." *Murtha III*, 840 F. Supp. at 184.

In *Murtha I* we rejected the contention that a specific mixture or waste solution must be listed within § 9601(14) or incorporated by reference in order to fall within CERCLA's coverage. We explained that "[w]hen a mixture or waste solution contains hazardous substances, that mixture is itself hazardous for purposes of determining CERCLA liability. Liability under CERCLA depends only on the presence in any form of listed hazardous substances." *Murtha I*, 958 F.2d at 1201; *see also United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 259-61 (3d Cir. 1992) (rejecting quantitative requirement); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669 (5th Cir. 1989) (same).

It is enough that a mixture or waste solution contain a hazardous substance for that mixture to be deemed hazardous under CERCLA. The waste product itself "need not be listed by name—instead of its constituent components—to fall within the Act." *Murtha I*, 958 F.2d at 1201; *see also Lousiana-Pacific Corp. v. Asarco Inc.*, 24 F.3d 1565, 1573 (9th Cir. 1994) (holding that even if product not specifically listed as hazardous substance, if components include hazardous substances, product is regulated by CERCLA), *cert. denied*, 115 S. Ct. 780 (1995); *Eagle-Picher Indus. v. EPA*, 759 F.2d 922, 930-31 (D.C. Cir. 1985) (rejecting contention that because most mining wastes and fly ash contain some hazardous substances, mining wastes and fly ash must therefore be specifically listed as hazardous substances).

Our understanding is also consistent with Congress' plan. Legislative history reveals that "the release of any [listed hazardous or toxic substances] *or any constituent of them* invokes the notice requirements and response provisions and any costs of removal or remedial action or any damages are subject to the liability provisions of the bill." Senate Report at 24-27, Leg. Hist. at 331 (emphasis added). In short, it makes no difference that the specific wastes disposed of by the appellees were not themselves

listed as hazardous substances, because so long as their component parts were listed as hazardous substances there may be CERCLA liability.

Appellees declare this approach will lead to CERCLA liability if a discarded object had any EPA listed hazardous substance in its chemical genealogy, whether or not the chemical component's characteristics had been unalterably changed in the manufacturing process. Even if this objection is sound in theory, it is not relevant. The instant case involves not only discarded objects like pens or plastic containers that might include a hazardous substance in their chemical make-up. Appellees are accused of dumping waste that contained hazardous substances in separable, identifiable forms. According to an affidavit submitted by the coalition, the cumulative waste stream discarded in the Murtha's landfills included municipal sludge, incinerator ash, varnishes, paints, tar remover, caulking compounds, pesticides, glues, degreasers, and automotive lubricants. Obviously, disposal of this sort of waste poses a greater threat of releasing hazardous substances than is presented by—to use an example offered by the appellees at oral argument—the disposal of a single plastic pen.

In an attempt to avoid this conclusion, appellees invoke *Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 992-93 (1st Cir. 1995). Blackstone held that the EPA should make an initial determination of whether ferric ferrocyanide (FFC)—in this case a blue-colored substance on wood chips—is a cyanide and therefore a hazardous substance. The First Circuit ruled that even if FFC contained cyanide as a chemical component, the cyanide might not exist in a form convertible to free cyanide and therefore might not be a CERCLA hazardous substance. *Id.* at 990-91. However, in this case, the First Circuit focused on whether FFC was a hazardous substance. It did not suggest that were FFC found to be a hazardous substance, liability might be avoided because "wood chips"

—the product allegedly discarded by the polluter—were not in themselves hazardous substances within the Act's definition. In short, the appellees' reliance on *Blackstone* is misplaced.

Thus, those dismissals in the present case that were predicated on the notion that a waste product is not covered by CERCLA unless specifically listed as a hazardous substance—even when its component parts are hazardous substances—misconstrued CERCLA and must be reversed.

2. *Releasability*

The trial court ruled further that "[t]he absence of evidence of breakdown of products that contain [hazardous substances] . . . precludes a finding that disposal of that product constitutes a disposal of [hazardous substances]." *Murtha II*, 815 F. Supp. at 545. Later, it explained that statement by saying that "[l]iability does not lie if the material disposed of would release a [hazardous substance] only on the intervention of another force." *Murtha III*, 840 F. Supp. at 188. The coalitions believe that these pronouncements were wrong.

As noted, to make out a *prima facie* CERCLA case, a plaintiff must show a "release, or a threatened release . . . of a hazardous substance." § 9607(a)(4). Accordingly, if a hazardous substance is only used in a non-releasable form in the manufacturing of a product, it may scientifically be impossible for the plaintiff to show a "threatened release." Hence, the district court properly required plaintiffs to show a release or threatened release. But, when it required them to show an actual breakdown of products containing hazardous substances, and determined there was no liability if the hazardous substances would only be released by an intervening force, it acted in a manner contrary to precedent.

In *Alcan*, we held that proof that a defendant's waste did not release listed hazardous substances is only relevant

to the issue of apportionment of damages, not to the issue of liability. *Alcan*, 990 F.2d at 722. Independent releasibility is not required to establish liability; a defendant otherwise liable may show "nonreleasibility" in order to mitigate its share of damages. It follows logically that a defendant who disposes of hazardous substances that are not independently releasable may still be held liable, even though that defendant may not be required to pay damages when the cost apportionment phase of the litigation is reached.

In addition, the trial court's reading of CERCLA is inconsistent with the Act's language, which provides only the four already recited causation-related defenses. 42 U.S.C. § 9607(b). The canon of construction that says "expressio unius est exclusio alterius" cautions against creating additional exceptions to complex statutory enactments. *Cf. Greene v. United States*, 79 F.3d 1348, 1355 (2d Cir. 1996) (applying this principle in the context of federal tax law).

Moreover, if we required a plaintiff to show more than a release or threatened release, we essentially would be asking the plaintiffs to prove that a specific defendant's hazardous substances caused the release of a hazardous substance. No causation is needed, however, to establish liability under CERCLA, *see Alcan*, 990 F.2d at 721, because it is, as stated, a strict liability statute. *See Shore Realty*, 759 F.2d at 1042; *see also Alcan Aluminum*, 964 F.2d at 266 (requiring only that plaintiff prove that hazardous substances were deposited at a site from which there was a release or threatened release that caused response costs to be incurred); *Amoco*, 889 F.2d at 670 n.8 ("[I]n cases involving multiple sources of contamination, a plaintiff need not prove a specific causal link between costs incurred and an individual generator's waste.").

None of the lower court cases upon which the district court relied as precedent for its view regarding releasability

is persuasive. *See, e.g., United States v. New Castle County,* 769 F. Supp. 591, 597 (D. Del. 1991); *United States v. Serafini,* 750 F. Supp. 168, 171 (M.D. Pa. 1990). Although appellants must show a release or threatened release in order to make out a *prima facie* case, the additional releasability requirement of product breakdown finds no support in CERCLA.

3. *Negligible Amounts*

The coalitions further contend that the district court impermissibly required a showing that appellees disposed of hazardous substances above a threshold amount. It granted summary judgment to an appellee where the amounts of hazardous substances it disposed of were "minuscule," *Murtha III,* 840 F. Supp. at 184, or "[n]ominal," *Murtha II,* 815 F. Supp. at 545. Twice we have said that quantity "is not a factor" when determining CERCLA liability because had Congress wanted to distinguish liability on the basis of quantity, it would have so provided. *Murtha I,* 958 F.2d at 1200; *see also Alcan,* 990 F.2d at 720 ("The statute on its face applies to 'any' hazardous substance, and it does not impose quantitative requirements."). The absence of threshold quantity requirements in CERCLA leads logically to the conclusion that the Act's "hazardous substance" definition includes even minimal amounts. *See Alcan,* 990 F.2d at 720. The dismissals on these grounds constitute legal error.

4. *EPA Designation*

The trial judge implied, in a few cases, that the EPA's decision not to designate a party as a potentially responsible party is relevant in determining CERCLA liability. *See, e.g., Murtha III,* 840 F. Supp. at 184 ("[Appellee] was not designated as a PRP by the EPA.") In *Murtha I,* 958 F.2d at 1205, we concluded that EPA policy "merely indicates that the EPA presently does not intend to pursue enforcement actions against" unnamed parties. However,

here the district court weighed the plaintiffs' evidence of liability "against the backdrop of the EPA Municipal Policy that a [party] would not be charged as a PRP absent evidence that its waste deposited at the site in question contained specific [hazardous substances]." *Murtha III*, 840 F. Supp. at 188.

EPA enforcement decisions are not helpful in deciding whether a party is properly joined as a defendant in a given action. *See Murtha I*, 958 F.2d at 1205 (explaining that EPA prosecutes only largest contributors or those with the means to pay, leaving those defendants to seek contribution from other potentially liable polluters). This is consistent with the general understanding that "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Congress has explicitly authorized private rights of action independent of EPA enforcement decisions. For these reasons, the agency's decision not to initiate its own enforcement action is irrelevant in determining whether a defendant might be liable under CERCLA.

Appellees maintain that no decision was made in any case in exclusive reliance on the EPA policy, and that the court's reference to that policy was merely illustrative. It is difficult to see what the EPA policy illustrated, as we have ruled that the policy is legally irrelevant when determining CERCLA liability. To the extent the district court relied upon an EPA designation in deciding whether to grant summary judgment, it committed error.

5. *Successor Liability*

Several decisions were made regarding the scope of successor liability. In the case of one appellee, it was found that although the successor continued its predecessor's business "using its former assets, employees and customers," summary judgment in favor of that appellee on liability

was proper. *Murtha III*, 840 F. Supp. at 185. In another instance, no successor liability was found even when "[a] prior sole proprietorship was conducted under a comparable name" and the predecessor "sold the business and related assets to [a successor]." *Id.* at 191. A third case was dismissed despite a successor's purchase of assets and continuation of the predecessor's business. *Id.* at 190.

The district court did not explicitly formulate a test for deciding when successor liability exists. *See Murtha III*, 840 F. Supp. at 185. And, although the question has been addressed in other circuits, we have yet to decide exactly what is required for successor liability under CERCLA, *see New York v. N. Storonske Cooperage Co.*, 174 B.R. 366, 374 (N.D.N.Y. 1994) (recognizing that we have not decided this issue). We turn to this question now.

We consider first the Act's language, recognizing at the outset that the Act has no provision explicitly governing corporate successor liability. *See Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F. 2d 86, 91 (3d Cir. 1988) ("CERCLA failed to address many important issues, including corporate successor liability."), *cert. denied*, 488 U.S. 1029 (1989); *see also United States v. Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992) (explaining that CERCLA is silent on this subject); *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1263 (9th Cir. 1990) ("Congress has not addressed the issue of successor liability under CERCLA.").

Nonetheless, most courts have read CERCLA as making successor corporations liable, in certain circumstances, for their predecessors' acts. *Carolina Transformer*, 978 F.2d at 837; *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1245 (6th Cir. 1991); *Louisiana-Pacific*, 909 F.2d at 1263; *Smith Land*, 851 F.2d at 91-92; *N. Storonske*, 174 B.R. at 374; *In Re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution*, 712

F. Supp. 1010, 1013 (D. Mass. 1989) (following *Smith Land*). *See United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 487 (8th Cir. 1992) (successor corporations are "persons" liable under CERCLA).

In our view CERCLA imposes successor liability. The plain language of the Act imposes liability on any "person" who fits within the four categories of liable parties. 42 U.S.C. § 9607(a). "Person" is defined to include, *inter alia*, a "corporation, association, partnership, consortium, joint venture, [or] commercial entity." § 9601(21). Further, federal law provides a rule of construction that when the word "company" or "association" is used, it "embrace[s] the words 'successors and assigns of such company or association.'" 1 U.S.C. § 5; *see Anspec*, 922 F.2d at 1247 (applying § 5 in analyzing CERCLA liability). Thus, CERCLA's statutory language, properly read, provides for successor liability.

Moreover, the Act's broad remedial purpose would be sharply curtailed if the Act did not encompass successor liability. As the Third Circuit has observed, "[t]he concerns that have led to a corporation's common law liability . . . for the torts of its predecessor are equally applicable to the assessment of responsibility for clean-up costs under CERCLA." *Smith Land*, 851 F.2d at 91. In other words, absent successor liability, a predecessor could benefit from the illegal disposal of hazardous substances and later evade responsibility for remediation simply by changing the form in which it does business, thereby subverting the Act's purpose of holding responsible parties liable for cleanup costs. *See Murtha I*, 958 F.2d at 1198. We will not read § 9607(a) in a manner that would defeat Congress' overall purpose, absent an express statement from the legislature that we do so. *See Shore Realty*, 759 F.2d at 1045.

A number of courts have recognized the importance of national uniformity and applied traditional rules of successor liability, rather than the successor liability law of a

given state. *See Smith Land*, 851 F.2d at 91 (instructing district court to consider national uniformity in resolving successor liability issues under CERCLA); *see also Mexico Feed*, 980 F.2d at 487 n.9 (upholding the application of federal law); *Louisiana-Pacific*, 909 F.2d at 1263 & n.2 (deeming appropriate a federal rule that relies on traditional common law notions because of the need for national uniformity). *But see Anspec*, 922 F.2d at 1248 (applying successor liability law of forum state); *N. Storonske*, 174 B.R. at 375 (applying a mixture of state and traditional norms). The traditional common law rule states that a corporation acquiring the assets of another corporation only takes on its liabilities if any of the following apply: the successor expressly or impliedly agrees to assume them; the transaction may be viewed as a *de facto* merger or consolidation; the successor is a "mere continuation" of the predecessor; or the transaction is fraudulent. *Carolina Transformer*, 978 F.2d at 838; *see also Mexico Feed*, 980 F.2d at 487; *Louisiana-Pacific*, 909 F.2d at 1263. Both sides agree that this is the standard.

The coalitions contend that when determining whether there is a "mere continuation," we should not use the common law test (sometimes referred to as the identity test), which requires the existence of a single corporation after the transfer of assets, with an identity of stock, stockholders, and directors between the successor and predecessor corporations. *See Carolina Transformer*, 978 F.2d at 838 (explaining traditional rule). Rather, they urge that we employ the "continuity of enterprise" approach, also called the "substantial continuity" rule. The Supreme Court has followed this approach in the labor law context by asking if the successor maintains the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produces the same products for the same customers. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987); *see also Mozingo v. Correct Mfg. Corp.*, 752

F.2d 168, 175 (5th Cir. 1985) (using a slightly different version of substantial continuity test).

CERCLA is entitled to a construction that advances its primary goals. Because the substantial continuity test is more consistent with the Act's goals, it is superior to the older and more inflexible "identity" rule, *see Carolina Transformer*, 978 F.2d at 838, 840 (endorsing this approach); *see also Mexico Feed*, 980 F.2d at 487-89 (same); *United States v. Western Processing Co.*, 751 F. Supp. 902, 905 (W.D. Wash. 1990) (looking to continuing business test). *But see Sylvester Bros. Dev. Co. v. Burlington N. R.R.*, 772 F. Supp. 443, 447-49 (D. Minn. 1990) (declining to apply the "continuing business enterprise" test). We therefore adopt the substantial continuity test as the appropriate legal test for successor liability under CERCLA. *Cf. Schiavone*, 79 F.3d at 255 (recognizing direct operator liability because it is compatible with statutory language and consistent with CERCLA's remedial scheme).

The district court spent little time exploring this question. It noted the coalitions' citation to *Turner v. Bituminous Casualty Co.*, 244 N.W. 2d 873, 883 (Mich. 1976), an early case defining the "continuity of the enterprise" or substantial continuity approach, yet refused to impose successor liability without "convincing authority." *Murtha III*, 840 F. Supp. at 185. Because an approach quite similar to that used in *Turner* is the one we follow in determining successor liability, we must reverse those grants of summary judgment where the district court applied a different and more restrictive law of successor liability.

6. *Transporter Site-Selection*

Summary judgment also was granted to several alleged transporters of hazardous substances for various reasons, including those we have already discussed. An additional

reason was offered for the decision concerning the transporters—they were held not liable because "they were directed to the sites or transfer stations by others." *Id.* Hence, we must address the legal question of whether site-selection is a required element for transporter liability.

The Act imposes liability on

> any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance

42 U.S.C. § 9607(a)(4). This awkwardly worded provision requires that we decide whether "selected by such person" modifies the entire phrase "disposal or treatment facilities, incineration vessels or sites" or only the immediately antecedent word "sites." If the latter reading is correct, there is no basis for imposing a site-selection requirement for transporter liability where the substances were, as here, disposed of at a disposal or treatment facility.

The appellants offer two principal arguments in support of this reading. First, they point out that the Act elsewhere defines a facility as "any site . . . where a hazardous substance has been deposited, stored, disposed of, or placed." 42 U.S.C. § 9601(9). They aver that reading the "selected by such person" language to apply only to sites other than those where hazardous substances have been deposited, stored, disposed of, or placed, is therefore necessary to prevent the word "sites" from being redundant. *See, e.g., Bailey v. United States*, 116 S. Ct. 501, 507 (1995) (construing statute to avoid making words redundant). Second, they urge that we keep in mind the Act's legislative purpose of making all who profit from pollution pay for their conduct.

Recently, a sister Circuit concluded that CERCLA includes a site-selection requirement for transporters. *Tippins Inc. v. USX Corp.*, 37 F.3d 87, 94 (3d Cir. 1994). While noting the canon of statutory construction that "absent a clear intention to the contrary, a modifier's reference is to the closest noun," *id.* at 93, the court recognized that this canon need not be followed in all instances. *Id.*; *see also Nobelman v. American Sav. Bank*, 508 U.S. 324, 330-31 (1993) (reliance on the "rule of the last antecedent" is not "compelled"). Here, following the canon and adopting the appellants' rule would create an odd paradox: A transporter who brought hazardous substances to a disposal facility would be strictly liable, while a transporter who brought hazardous substances to some site other than a facility would not be liable unless the transporter itself selected the site. *Tippins*, 37 F.3d at 93-94. Thus, the coalitions' reading, while "quite sensible as a matter of grammar," *Nobelman*, 508 U.S. at 330, would "lead to a curious result." *Tippins*, 37 F.3d at 93.

The Third Circuit's conclusion is consistent with most other courts that have considered the subject. *See id.* (collecting cases); *see also United States v. Hardage*, 985 F.2d 1427, 1435 (10th Cir. 1993) (requiring site selection for transporter liability); *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1356 (N.D. Ill. 1992) (same); *Alcatel Info. Sys. v. Arizona*, 778 F. Supp. 1092, 1096 (D. Ariz. 1991) (same); *United States v. Western Processing Co.*, 756 F. Supp. 1416, 1420 (W.D. Wash. 1991) (same). *But see Prisco v. New York*, 902 F. Supp. 374, 388 (S.D.N.Y. 1995) (stating test for transporter liability without noting a site selection requirement); *Jersey City Redevelopment Auth. v. PPG Indus.*, No. CIV.A. 85-2014, 1987 WL 54410, at *5 (D. N.J. Sept. 3, 1987) (finding that "selected by the transporter" modifies only "sites"), *aff'd without written opinion*, 866 F.2d 1410, 1411 (3d Cir. 1988).

We are persuaded by the reasoning of *Tippins* and hold that only transporters who select the disposal loca-

tion are liable under CERCLA. As a consequence, we agree with the district court that unless the transporters selected the facility or disposal site, they cannot be found liable under the Act. However, the meaning of the word "selected" is hardly clear. *Tippins*, 37 F.2d at 94, determined that a transporter is properly liable under the Act when it ultimately selects the disposal facility or when its active participation in the decision amounted to "substantial input into which facility was ultimately chosen."

This view accords with the Act's language and purpose. First, a transporter can be said to select a facility or site when it helps the generator choose a disposal facility by recommending a facility or set of facilities. Second, a transporter who plays an active role in choosing the disposal facility is obviously more culpable and responsible for the resultant harm than a transporter who simply does the bidding of a given generator; the latter has a more attenuated connection to the harm. An "active participation" standard recognizes the often significant role played by transporters in choosing the disposal site. Hence, in cases of transporter liability, we must vacate the grants of summary judgment and remand for further consideration in light of the above discussion.

II. Procedural Issues

We address next appellants' procedural arguments that are common to a great many of the cases before us.

A. *Summary Judgment Standard*

We have recognized in CERCLA's context that summary judgment is a "powerful legal tool[]" that can "avoid lengthy and perhaps needless litigation." *Alcan*, 990 F.2d at 720. This tool is one well adapted to encouraging settlement and speeding remediation. *See In re Cuyahoga Equip. Corp.*, 980 F.2d at 119 (CERCLA designed to encourage settlement to reduce litigation costs). Its utility in CERCLA litigation is not a license to use it when

material facts are genuinely disputed. Just as there is no heightened pleading standard in CERCLA cases, *see Warwick Admin. Group v. Avon Prods., Inc.*, 820 F. Supp. 116, 121 (S.D.N.Y. 1993); *cf. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (heightened pleading requirement exists only in cases involving fraud or mistake), the showing required to survive summary judgment also remains the same.

We now briefly describe the standard for summary judgment under Fed. R. Civ. P. 56. A party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). When a court is confronted with facts that permit several different conclusions, all inferences from the underlying facts must be drawn in the nonmovant's favor. *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 64 (2d Cir. 1995). The trial court must bear in mind that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

If the movant demonstrates an absence of material issues of fact, a limited burden of production shifts to the non-movant, which must "demonstrate more than 'some metaphysical doubt as to the material facts, . . . [and] must come forward with "specific facts showing that there is a genuine issue for trial." ' " *Aslandidis v. United States Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir. 1993) (citations and emphasis omitted). Summary judgment, then is granted only when "there is an absence of evidence to support the nonmoving party's case," *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), or, in other words, only if "no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight." *Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1224 (2d Cir. 1994). The trial court's task is

"carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." *Id.*

B. Sua Sponte *Summary Judgment*

The district court granted summary judgment *sua sponte* in a number of cases. A *sua sponte* grant of summary judgment may be appropriate so long as the losing party was notified prior to its grant and given the opportunity to produce whatever proof it has in opposition. *Celotex*, 477 U.S. at 326; *see also FLLI Moretti Cereali S.p.A. v. Continental Grain Co.*, 563 F.2d 563, 565 (2d Cir. 1977) (power to grant summary judgment *sua sponte* "must be exercised with great caution and with care taken to give the parties an opportunity to present materials in opposition"). To ensure the parties have notice and an opportunity to be heard, we have established a policy of adhering closely to the ten day notice period specified by Rule 56(c). *See Scottish Air Int'l, Inc. v. British Caledonian Group, plc*, 945 F.2d 53, 55 (2d Cir. 1991) (per curiam).

Notice furthers two important interests. First, it gives the losing party an opportunity to develop the record to demonstrate that genuine material issues are in dispute or that determinative legal quesions should be resolved in its favor, and thereby prevents the losing party from suffering procedural prejudice. Second, the parties' development of a complete record facilitates *de novo* appellate review. *See Hispanics For Fair and Equitable Reapportionment (H-FERA) v. Griffin*, 958 F.2d 24, 25 (2d Cir. 1992) (per curiam). When the non-moving party asserts that it cannot adequately respond to its opponent's motion for summary judgment in fewer than ten days, it should be given the full ten days unless there is good reason to believe that the assertion is a sham. *See Gutwein v. Roche Labs.*, 739 F.2d 93, 96 (2d Cir. 1984). Here, the coalitions insist they were denied notice and an opportunity to

be heard before the district court granted summary judgment *sua sponte* against them in a number of cases.

Our review of the underlying procedural history indicates that such was the case. On December 20, 1993, the trial court ordered the coalitions to file a list of third parties that the coalitions intended to pursue. *Murtha III*, 840 F. Supp. at 191. Although it directed the coalitions to "be sure that [its prior] rulings . . . are fully considered and accommodated," *id.*, this is too vague an admonition to be deemed equivalent to notice. When the coalitions asked for additional time, their request was denied and the prior order was reaffirmed. Three weeks later, on January 10, 1994, the coalitions were again ordered to review their files and "list" those third party claims each intends to pursue as valid. The district court further explained that "[a]ny third party claim not so listed by January 21, 1994, will be dismissed as not intended to be prosecuted further."

The district court acknowledged—in an order dated February 5, 1994—that appellants eventually prepared and presented such lists but, rather than simply dismissing those claims the coalitions did not intend to pursue, the district court dismissed a great many others *sua sponte*. In a case involving some 3000 filings, the coalitions were no doubt dedicating most of their effort between December 20, 1993 and February 5, 1994 to sifting through their records and compiling the list requested by the trial court. The coalitions were not asked to produce supporting papers or legal arguments to undergird their liability claims—they were only directed to submit a list within 11 days of the January 10 order. It is hardly surprising that the coalitions simply submitted the lists and did little else.

A more prudent course for the district court would have been to give the coalitions ten days' notice to show good cause why summary judgment should not be granted against them. Such a course also would have given the

district court the benefit of the arguments and evidence of both sides and would have provided a more complete record on appeal. *See Herzog & Straus v. GRT Corp.*, 553 F.2d 789, 792 & n.5 (2d Cir. 1977) (notice and opportunity to make arguments are vital to making an informed judgment); *cf. Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 65 (2d Cir. 1988) (ruling erroneous a decision to grant motion to dismiss on ground neither raised nor briefed by parties). As the record currently stands, we have no knowledge of the precise reasons for the district court's decision to grant summary judgment *sua sponte* in those cases where it took that course of action. It said only that there was "want of substantiation," a truism that necessarily applies to all grants of summary judgment and which adds nothing to our understanding of the trial court's decision. Because the coalitions' claims are not demonstrably frivolous, the summary judgment dismissals, made *sua sponte* without ten days' notice, were error.

C. *Discovery Limitations*

In the course of this litigation, the district court placed certain restrictions on discovery. For over one year—from March 6, 1991 until April 29, 1992—it did not allow discovery outside of that permitted by the uniform discovery orders. Showings of good cause for further discovery were not entertained until April 29, 1992, when the court solicited motions for summary judgment. Several weeks later, it promised the coalitions additional discovery for them to respond to the forthcoming summary judgment motions. The special master repeated the promise in August, but refused to authorize discovery until the motions for summary judgment were submitted and coordinated. In December, appellants were given 60 days within which to conduct limited deposition discovery. They contend that these discovery limitations were so severe as to be an abuse of the trial court's discretion and to constitute reversible error.

A trial court necessarily has wide discretition in managing pre-trial discovery, *see Cruden v. Bank of New York*, 957 F.2d 961, 972 (2d Cir. 1992), and we will not disturb its orders absent a clear abuse of its discretion, *id.*; *Robertson v. National Basketball Ass'n*, 622 F.2d 34, 35-36 (2d Cir. 1980). Reversal of a judgment because of an improper order denying or curtailing discovery is "unusual." 8 Charles A. Wright et al., *Federal Practice and Procedure* § 2006, at 92 (2d ed. 1994).

We find no abuse of discretion in the district court's management of discovery. In complex multi-party litigation, a trial court often needs to use its broad authority to control discovery. Some of the measures adopted here, such as time limits, schedules for discovery, and limitations on deposition discovery, have been specifically recommended as acceptable options. *See Manual For Complex Litigation (Third)* § 21.422 (1995); H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862 (supporting the enactment of amendments to CERCLA and urging district courts to "carefully manage" CERCLA cases "to insure that the litigation is conducted in an expeditious manner" through, *inter alia*, the "exercise of strict judicial control over multi-party proceedings . . . as well as use of the procedures set forth in the *Manual For Complex Litigation*").

The district court sought to guard against what it thought might be a wildfire of unwarranted discovery, recognizing that unduly extensive use of discovery could make the litigation expense disproportionate to the cost of cleaning up the landfills. In order to have orderly and reasonable discovery, the trial judge required that a high standard of good cause be met before discovery beyond that provided in the uniform orders would be permitted. Its orders were tailored appropriately to meet this need.

Appellants also strongly challenge the denial of their requests for additional discovery under Fed. R. Civ. P.

56(f). Rule 56(f) allows a party faced with a motion for summary judgment to request additional discovery, and the Supreme Court has suggested that such a request be granted when "the nonmoving party has not had an opportunity to make full discovery." *Celotex*, 477 U.S. at 326. Here too we will reverse only if there was an abuse of discretion. *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994). Doubtless, more discovery might have been helpful, but in a case this complex the information falling within the broad purview of federal discovery is almost without limit. In this light it is hard to fault the district court for placing limitations on discovery. Given the circumstances of this case, we see no abuse of discretion either in its discovery orders or its decision rejecting the appellants' Rule 56(f) motions.

D. *Expert Opinion*

A final contested issue common to most of the claims involved in the instant case concerns the district court's evaluation of the scientific expert opinion of Dr. Kirk W. Brown, a Professor of Soil and Crop Sciences at Texas A&M University. The coalitions relied on Dr. Brown's affidavit as crucial evidence in opposing the appellees' summary judgment motions. Before discussing the district court's assessment of Dr. Brown's affidavit, a brief review of the contents of the affidavit is necessary.

1. *Expert's Credentials and Methodology*

Dr. Brown holds a masters degree from Cornell University and a doctorate in agronomy from the University of Nebraska. He has written more than 150 scholarly, scientific articles and a book dealing with the disposal and treatment of hazardous waste substances. His professional qualifications make him an expert witness, and the district court so found. *See Murtha II*, 815 F. Supp. at 543.

Dr. Brown submitted an affidavit in support of the coalitions' position that appellees were potentially re-

sponsible parties at both landfill sites. In preparing this sworn statement, he reviewed numerous reports including, most significantly, six reports relating to the Laurel Park landfill and three reports discussing the Beacon Heights landfill.[5] After examining these reports, the expert was of the opinion that "there [were] CERCLA hazardous substances present in each and every leachate sample from these landfills." Dr. Brown did not personally visit the landfills or dig up any shovelfuls of waste, but he was not required to do so.

He studied EPA reports concerning municipal and industrial landfills in the United States and he set forth the types of hazardous substances found in waste streams generated by households, commercial establishments, institutions, and industries. He used these reports to generate lists of the wastes and CERCLA hazardous substances routinely discarded by typical households, commercial establishments, institutions, and industries during the time period relevant to this case. After comparing the concentrations of hazardous substances in the leachates from the two landfills with the concentrations generally found in municipal solid waste landfills in the United States, he concluded, in his expert opinion, that the waste streams disposed of in the two landfills were similar to the landfills he had studied and that they contained CERCLA hazardous substances.

Further, Dr. Brown read the statements that the various appellees made in their deposition testimony and read other documents relevant to the kind of waste disposed of by each appellee. His comments varied for each appellee.

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[5] Some appellees claimed that Brown never studied the two landfills involved in this litigation or that he failed to investigate the landfill wastes. This is patently wrong. Particularly mendacious is the implicit claim by Manafort Brothers, E. Eric Arsan Refuse, NRS Carting, and Zollo Drum that none of the studies used by Dr. Brown dealt with the relevant landfills. This contention is wholly contradicted by the record.

Based on the available information, he meticulously linked the types of wastes, including identification of specific products discarded by each defendant, with specific CERCLA hazardous substances. His analysis relied on a series of studies and reports that showed which known CERCLA hazardous substances are in specfiic waste products. This allowed him to correlate the specific wastes disposed of by each appellee to specific hazardous substances.

For example, when a party admitted to disposing of tire products, Dr. Brown explained which hazardous substances are found in normal tire products. Although he could not swear with absolute certainty that the tire products disposed by a specific appellee were similar to normal tire products, such absolute certainty is not required to oppose successfully a summary judgment motion; rather, at the summary judgment stage, the trial judge must decide only whether a reasonable jury could find liability by a preponderance of the evidence. Further, when the appellees failed to submit any evidence to distinguish the products of which they disposed from those addressed by Dr. Brown in his affidavit, Dr. Brown's probabilistic evidence stands largely uncontradicted. Moreover, each and every type of product disposed of need not contain hazardous substances. Any amount of such substances is sufficient to create liability.

2. *Admissibility of Brown Affidavit*

Although the district court agreed that Dr. Brown was an expert, and that his evidence could be admissible against certain parties, it apparently did not place much weight on the affidavit. It ruled that the expert's sworn statement was not controlling for non-municipal generators, *id.* at 544, and that it could not be applied to the municipal generators because no adequate foundation for its acceptance had been laid. *Murtha III,* 840 F. Supp. at 189. More specifically, the district court added, Dr. Brown's "references to facts, without specification, in vari-

ous documents relied on," are insufficient to make his opinions relevant." *Id.* It therefore rejected the affidavit as lacking "probative merit" because it did not rely on "direct evidence." *Id.* at 184. In addition, the court expressly weighted the affidavit against the backdrop of the EPA Municipal Policy, according to which the EPA made certain enforcement decisions. *Id.* at 188.

Our view of this affidavit and its probative worth differs dramatically from that of the district court. This is partly because it is difficult for us to imagine an expert with more experience and knowledge in the hazardous substances field than Dr. Brown, and partly because we find his affidavit to be carefully researched, detailed, and directly relevant to this case. As will become clear when we consider each appellee's case individually, we think the trial court assessed the weight of conflicting proof, in effect substituting its judgment for that of the jury. *See In Re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1133 (2d Cir. 1995) (applying the rule prohibiting such a practice). Environmental science, like epidemiology, "is ill-suited to lead a factfinder toward definitive answers, dealing as it does in statistical probabilities." *Id.* Here there was only one expert opinion before the court, and the court was obliged not to ignore it. Because Dr. Brown reviewed nine studies concerning the subject landfills, his affidavit was laid on a proper foundation.

When deciding a motion for summary judgment, only admissible evidence may be considered. *Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51, 53 (2d Cir. 1993). Where scientific knowledge will assist a trier of fact to determine an issue of fact, an expert witness "may testify . . . in the form of an opinion or otherwise." Fed. R. Evid. 702. Summary evidence is admissible when the underlying documents are admissible and are made available to the adverse party. *Tamarin*, 13 F.3d at 53. Here, where the reports used by Dr. Brown are of the sort ordinarily relied on by experts in forming opinions within their field of

expertise, the reports need not be admissible at trial, *see* Fed. R. Evid. 703, and need not actually be attached to the affidavit to satisfy Fed. R. Civ. P. 56(e). *See Iacobelli Constr., Inc. v. County of Monroe,* 32 F.3d 19, 25 (2d Cir. 1994). An expert's testimony, in order to be admissible under Rule 705, need not detail all the facts and data underlying his opinion in order to present that opinion. *See* Fed. R. Evid. 705; *Ambrosini v. Labarrague,* 966 F.2d 1464, 1469 (D.C. Cir. 1992). At any rate, the Brown affidavit does provide the specific facts required by Rule 56(e), *see id.* at 1470, when he explains which specific hazardous substances are found in each waste disposed of by each appellee.

Nor is the Brown affidavit "junk science" of the sort that should be rejected under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). Dr. Brown relied on the methodology and data typically used and accepted jn these sorts of cases, *see Iacobelli,* 32 F.3d at 25, and his testimony would therefore be admissible under *Daubert,* 509 U.S. at 592-95. Moreover, if the appellees honestly believe this scientific evidence is weak, they should cross-examine him vigorously at trial and present contrary evidence to refute his findings and conclusions. *Id.* at 596. This is the traditional and appropriate means of attacking admissible evidence with which one disagrees. *Id.* In addition, given that CERCLA hazardous substances are listed at 40 C.F.R. § 302.4, Table 302.4, we cannot agree that because the Brown affidavit stated whether a given hazardous substance was one listed by CERCLA, it therefore improperly drew a legal conclusion. *See United States v. Articles of Banned Hazardous Substances Consisting of an Undetermined Number of Cans of Rainbow Foam Paint,* 34 F.3d 91, 96 (2d Cir. 1994) ("[E]xperts are not permitted to present testimony in the form of legal conclusions.").

The cases appellees cite in opposition are unpersuasive. For instance, *Mid-State Fertilizer Co. v. Exchange Nat'l*

Bank of Chicago, 877 F.2d 1333, 1338-39 (7th Cir. 1989), involved a seven-sentence-long expert affidavit devoid of factual references or reasoning. By contrast, Dr. Brown's affidavit is 141 pages long, every conclusion in it is drawn with reference to specific facts or explanations. It explains precisely what was reviewed and the general bases for his opinion.

The district court also incorrectly compared the affidavit with the "second-hand and factually spare" affidavit involved in *Chandler v. Coughlin*, 763 F.2d 110, 113 (2d Cir. 1985). *See Murtha III*, 840 F. Supp. at 189. Dr. Brown's extensive use of reports from the relevant facilities, the information found in discovery materials, and past scientific studies make his expert opinion highly probative. Dr. Brown relied in part on the information provided by the appellees, and he considered what sorts of hazardous substances are ordinarily found in the specific kinds of waste disposed of by appellees. This is a permissible approach for an expert witness in a case such as this. An examination of the Brown affidavit's detail demonstrates that the affidavit was thorough and well-supported, unlike the affidavit in *Chandler*, which was only a few paragraphs long.

Again, were the Brown affidavit the kind of evidence insufficient for a case to survive summary judgment under CERCLA, the Act's scope would be sharply limited. People and companies often dispose of waste without knowing its contents. In future lawsuits, once hazardous substances were discovered in a given facility, the generators would only need say that they could not recall what was in their waste. Because plaintiffs usually lack direct evidence that a defendant dumped hazardous substances, the potentially responsible parties would only be found liable in those rare instances in which a so-called "smoking gun" is discovered, *cf. Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) ("smoking guns" rarely found in litigation), and the broad, remedial purpose of the Act would thereby be defeated.

Of course, a CERCLA plaintiff is not required to prove its case with scientific certainty; a preponderance of the evidence is enough. *Cf. Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (per curiam) (Brennan, J., concurring) (discussing Title VII cases). While certainty is an ideal pursued by scientists and courts alike, it is not always a realistic goal in environmental science, where certainty can be elusive. *See Ethyl Corp. v. EPA*, 541 F.2d 1, 25 & n.52 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

Although we find Dr. Brown's affidavit highly probative, it is not dispositive of the issues at bar. Defendants may of course produce proof showing why their waste—tire products, for example—did not include the hazardous substances ordinarily found in tire products. It is up to the factfinder ultimately to determine whether Dr. Brown's opinion together with other evidence presented by the coalitions is sufficient to establish appellees' liability.

Because disputed factual issues exist, summary judgment—which the appellants request—may not be granted in their favor either. Expert testimony was essential in this complex environmental litigation to help comprehend scientific data and determine whether the chemicals covered by CERCLA as hazardous substances were contained in appellees' waste. It was error to reject Dr. Brown's written testimony that the wastes did contain such substances, particularly in the absence of any expert evidence to the contrary. The affidavit raised genuine issues of material fact in most of the cases before us, and therefore the grants of summary judgment in such cases were improper.

III. Case-By-Case Review

We pass to a review of 85 cases on an individual basis. Our review of the district court's decisions granting summary judgment is *de novo*. *E.g., Randell v. United States*, 64 F.3d 101, 106 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3808 (U.S. May 28, 1996). Because their disposition is duplicative of much of our earlier discussion,

we have placed this review in the Appendix at the end of this opinion. The Appendix contains a brief discussion of the district court's ruling, found generally in *Murtha III*, 840 F. Supp. at 183-91. In each case, unless otherwise indicated, we reverse and remand the case to the district court.

IV. The Governments' Response Costs Claims

We turn next to the government's litigation to recover response costs. The United States and Connecticut (collectively, the governments) both appeal the district court's decisions concerning their lawsuits against several non-settling potentially responsible parties for unreimbursed costs. *Murtha IV*, 855 F. Supp. at 546. We deal initially with the claim raised by the United States (U.S.), and we then consider briefly that of the State of Connecticut (State).

The U.S. makes two principal claims of error. First, it contends that the district court improperly considered the $1.975 million received by the Laurel Park Coalition under the Murtha consent decree as funds received by the government. Second, the U.S. asserts that judgment on the pleadings was inappropriate because the cost summaries it submitted to the district court showed unreimbursed response costs. Before we examine these specific contentions, we begin with a review of the relevant CERCLA law.

A. *Governing CERCLA Law*

The Act addresses the treatment of both settling and non-settling defendants:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the

> other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 U.S.C. § 9613(f)(2). In short, the Act provides that when, as here, a settlement addresses past and future costs, the non-settling defendants' liability to the government for those costs is reduced by the amount of the settlement. However, the non-settling defendants will still be held accountable for the remainder of the government's response costs, and that liability will be reduced only by the amount of the settlement rather than by the pro rata share attributable to the settling parties. In other words, non-settling defendants may bear disproportionate liability for their acts. *See United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1176 (1995). Further, as a means of encouraging settlements, only settling parties are guaranteed not to be liable for future contributions regarding the subjects addressed in the settlement.

As such, § 9613(f)(2) strengthens the federal policy of encouraging CERCLA settlements. Elsewhere the Act specifically asks that the government enter into CERCLA settlements "in order to expedite effective remedial actions and minimize litigation." § 9622(a). Courts considering CERCLA cases have recognized that the usual federal policy favoring settlements is even stronger in the CERCLA context. *See City of New York v. Exxon Corp.*, 697 F. Supp. 677, 692-93 (S.D.N.Y. 1968); *see also United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990).

Responsible parties are liable for "any . . . necessary costs of response incurred [that are] consistent with the national contingency plan." § 9607(a)(4)(B). The Act also states that "[t]he terms 'respond' or 'response' mean[] remove, removal, remedy, and remedial action," and these terms include "enforcement activities related

thereto." § 9601(25). Thus, the government's recoverable response costs properly include not only the obvious costs of remediation, but also include *inter alia*, attorneys' fees,[6] *United States v. Gurley*, 43 F.3d 1188, 1199-1200 (8th Cir. 1994), *cert. denied*, 116 S. Ct. 73 (1995), indirect administrative costs, *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1504 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990), studies conducted for remediation, *City of New York v. Exxon Corp.*, 633 F. Supp. 609, 618 (S.D.N.Y. 1986), and even prejudgment interest, § 9607(a). The response costs' consistency with the national contingency plan is presumed; the defendant bears the burden of proving inconsistency, and it must show "that the EPA acted arbitrarily and capriciously in choosing a particular response action." *United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992), *cert. denied*, 510 U.S. 913 (1993); *R.W. Meyer*, 889 F.2d at 1508. With this legal background in mind, we consider the government's contentions.

B. *District Court Decision*

As discussed earlier, the Beacon Heights Coalition and the U.S. agreed that the Beacon Heights Coalition would pay for the remediation at the Beacon Heights landfill and would pay the government for its future non-remediation responses costs in excess of $500,000. The Laurel Park Coalition agreed to conduct subsequent remediation at Laurel Park and to pay for the U.S.'s future oversight costs in excess of $200,000. Murtha paid $5,375,000 to

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[6] The appellees contend that *Key Tronic Corp. v. United States*, 114 S. Ct. 1960 (1994), forecloses any claim by the government that enforcement costs can include attorneys' fees. We disagree. *Key Tronic* denied private parties the right to recover attorneys' fees in a suit for contribution brought against the United States. The Court specifically "offer[ed] no comment on the extent to which th[e] phrase ["enforcement activities"] forms the basis for the Government's recovery of attorney's fees through § [9607]." *Id.* at 1967.

discharge its owner and operator liability at both landfills. The Murtha settlement proceeds were divided among several parties: $1,875,000 went to the Beacon Heights Coalition and $322,500 to the government for Beacon Heights response costs. At Laurel Park, the U.S. and the State were each paid $625,000 for past response costs. The remaining $1,975,000, initially placed in a registry account with the district court, was used for Laurel Park remediation by the Laurel Park Coalition. Had that coalition not formed within 18 months, the governments would have received the money for remediation at Laurel Park. However, when the coalition was formed, the precondition was met, and the money moved directly from the registry account to the Laurel Park Coalition.

Several non-settling parties claimed that all response costs incurred by both the U.S. and the State were covered by the Murtha settlement and the settlements with the two coalitions, accordingly those non-settling parties moved for judgment on the pleadings. The district court agreed, finding that the entire amount of the Murtha consent decree ($5.375 million) minus the amount paid to the Beacon Heights Coalition ($1.875 million) had to be credited against any unreimbursed past costs of the U.S. and Connecticut. *Murtha IV*, 855 F. Sup. at 546. By so holding, the district court credited the $1.975 million set aside for Laurel Park cleanup, and later given to the Laurel Park Coalition, against the government's response costs.

The district court stated that "[n]either EPA nor DEP present[ed] figures for incurred response costs not covered by the net Murtha settlement" of $3.5 million ($5.375 million minus the $1.875 million given to the Beacon Heights Coalition). *Id.* Holding that § 9613(f)(2) required that the non-settling defendants be credited with the full amount of the settlement (instead of reducing the government's unreimbursed costs by only the amounts it actually received), *id.* at 547, the trial court found that

this amount, along with funds received from the coalitions, totally wiped out all response costs incurred by the U.S. and the State. It therefore granted judgment on the pleadings.

On the government's and the State's response costs appeal, Armstrong Rubber Company, The Eastern Company, Kerite Company, Primerica, Inc., and George Clark are Beacon Heights appellees, and Atlantic Ritchfield Company, The Eastern Company, and Gerald Metals, Inc., are Laurel Park appellees.

C. *Judgment on the Pleadings Reversed*

The government contends first that the district court improperly included the $1.975 million that Murtha agreed to pay for Laurel Park remediation as funds received by the government. We agree with the government for several reasons. In our view, the government had neither possession nor actual control over the $1.975 million given to the Laurel Park Coalition. All parties agree that this portion of the money from the Murtha decree was deposited in a court registry account. It was then released to that coalition upon its formation. The district court took a contrary position, holding that the governments "had control and thus constructive possession of the settlement." *Murtha IV*, 855 F. Supp. at 547. Similarly, appellees contend that because the United States did not have to enter into an agreement with an industrial coalition for the clean-up of Laurel Park, the government effectively controlled the $1.975 million. However, because the Laurel Park Coalition's consent decree (forming the Laurel Park Coalition) was entered by the court one day after the Murtha consent decree was entered, the contingency required for the government to receive the Laurel Park funds—non-formation of the coalition—never occurred.

We decline to adopt the district court's expansive understanding of "possession." Just as the district court did

not credit the government or the State with receipt of the $1.875 million that the Murtha settlement allocated to the Beacon Heights Coalition, it should not have credited the government with receipt of the $1.975 million allocated under the terms of the Murtha settlement to the Laurel Park Coalition.

But even if we accepted the district court's "constructive possession" theory, we would still conclude that the district court failed to consider that this money was spent for remediation at the Laurel Park landfill. Hence, if the $1.975 million had been received by the government, it would follow that the government should then immediately have been credited for spending the money for remediation at Laurel Park—the money would have been part of the incurred response costs. The government recognizes that "[t]he sums cancel each other out," and no one disputes that the money was ultimately used for future response costs at Laurel Park. The appellees may be correct that this arrangement does not qualify as a mixed-funding reimbursement under § 9622(b)(1), but that does not make the arrangement impermissible under CERCLA, a broad remedial statute designed to promote settlements.

The settlements forged by the government furthered important interests advanced by CERCLA: multi-party settlements and quick remediation. By agreeing to the Murtha settlement, in which Murtha set aside $1.975 million for the Laurel Park Coalition for oversight costs, the government encouraged the formation of that coalition, which will now undertake remediation. This is precisely the sort of creative settlement that the government and private parties should endeavor to craft in the future. In sum, the district court should not have reduced the non-settling defendants' liability to the government by the $1.975 million paid by Murtha to the Laurel Park Coalition under the Murtha consent agreement.

We also agree with the governments that unreimbursed response costs at both facilities still may remain, and that judgment on the pleadings was therefore inappropriate. Judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c), may only be granted when the pleadings show that it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Hence, if the cost summaries submitted by the U.S. and the State support the relief sought, judgment on the pleadings was inappropriate. The government contends that the district court treated this motion as a summary judgment motion under Rule 56 without giving the government notice of its intention to do such. If this is what the district court did, it was error. *See Sellers v. M.C. Floor Crafters, Inc.,* 842 F.2d 639, 642 (2d Cir. 1988). However, because we believe the district court incorrectly interpreted the Act, we need not address this point.

The government submitted cost summaries on June 10, 1993 for both landfill sites. For Beacon Heights, the U.S. claimed that even though it had collected $356,508.06 from the Murtha consent decree, $2,855,334.35 remained as total outstanding costs. At Laurel Park, the U.S. collected $690,906.02 from the Murtha consent decree and $500,000.00 from the coalition for past costs, leaving the U.S. with $2,187,109.01 in outstanding costs. These cost summaries are supported by affidavits and other documentation. Based on its submissions, the government could prove facts entitling it to relief.

It is true that the coalitions will be paying most of the government's future costs. The Laurel Park Coalition will pay oversight costs in excess of $200,000, and the Beacon Heights Coalition will pay oversight costs in excess of $500,000. The Beacon Heights appellees claim that because the government incurred $1.1 million in response

costs before the Beacon Heights Coalition's consent decree and because the Beacon Heights Coalition will pay for all oversight costs over $500,000, the government's costs are effectively "capped" at $1.6 million. The Laurel Park appellees make a similar argument regarding the government's response costs at that coalition's landfill site, declaring they are capped at $4.5 million ($4.3 million spent by the U.S. before the Laurel Park Coalition's consent decree and $200,000 not paid by that coalition). But the government's costs are not limited to the oversight costs (which the coalitions have agreed to repay). The non-settling defendants might still be liable for other enforcement costs, such as attorneys' fees and prejudgment interest.

Further, even if future response costs are somewhat speculative, the government is still entitled to declaratory relief under CERCLA. *See Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 844-45 (6th Cir. 1994). As the entry of a declaratory judgment of liability for future costs is mandatory under the Act, the government should (if ultimately successful on remand) be granted declaratory relief in this action despite its failure properly to preserve this issue for appeal. *See United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir.) (explaining that where an issue was not properly preserved, appellate court may grant relief where such relief would be available in an independent action), *cert. denied*, 510 U.S. 843 (1993).

The Beacon Heights appellees also contend that the provision in § 9613(f)(2) that non-settling defendants should have their liability reduced by "the amount of the settlement" refers to the total amount of money provided to all parties in a settlement. As a consequence, they maintain, because the Murtha settlement did not just provide money to the government for Beacon Heights remediation but also allotted $1.875 million to the Beacon Heights Coalition, this $1.875 million should also be counted

when reducing the non-settlors' liability. However, the district court never questioned that the $1.875 million given to the Beacon Heights Coalition should not be counted against the government. The U.S. correctly explains that the appellees' theory would lead to absurd results. Consider the following hypothetical: The government and a state settle their claims with a landfill owner for $2 million, with each receiving $1 million. Each government has spent $2 million in response costs. Under the appelles' theory, even though the federal government only received $1 million, its recoverable responses costs would be reduced by $2 million and therefore erased. This is too preposterous to be maintained.

Finally, we believe that the disputes in this case over the accounting techniques used by the government raise fact questions inappropriate for determination on a motion for judgment on the pleadings. The government has met the limited showing required to avoid judgment on the pleadings.

D. *State of Connecticut's Claim*

Connecticut's claims on this appeal arise exclusively out of the Laurel Park landfill site. The State asserts it has incurred a total of $2,546,224.02 in response costs, including the costs for the installation of a water system and a new sewerline, as well as investigation expenses. The State contends that after it received funds from the Laurel Park Coalition's consent decree and the Murtha decree, $760,125.00 of unreimbursed response costs remained. As explained above, the district court incorrectly credited to the State a portion of the Murtha settlement that was paid to the Laurel Park Coalition. *See Murtha IV*, 855 F. Supp. at 547. Therefore, decision entering judgment against the State must also be reversed.

V. Summary Judgments Against United States

The government sued John and Joseph Betkoski, owners of the Beacon Heights facility until 1970 (when Murtha purchased the facility) and Richard Zollo, an alleged transporter of hazardous substances to the same landfill. All three were granted summary judgment by the district court, which concluded that the government failed to show the existence of a genuine issue of material fact as to their liability.

In the case of Richard Zollo, we again note that *sua sponte* summary judgment should generally only be granted after the losing party is given notice and an opportunity to present evidence and arguments in opposition. In any event, here the evidence before the court was sufficient for the government to survive summary judgment. The government submitted an affidavit that summarized certain EPA records concerning Zollo's disposal of waste at Beacon Heights. It also presented a letter from a waste generator serviced by Zollo that listed the chemicals present in its waste. This letter and other documents showed that Zollo transported to the landfill various materials (such as waste oil, waste chemicals, liquid paint, heavy sludges, paint residue, and latex scrap material) containing hazardous substances. And, Zollo admitted in an interrogatory submitted to the EPA he had transported waste from several companies to Beacon Heights. These papers raised a genuine issue of material fact, and summary judgment was therefore inappropriate.

We also conclude that the district court should not have granted summary judgment to the Betkoskis. If genuinely disputed material facts remain concerning whether Zollo transported hazardous substances to Beacon Heights, it is hard to see how the Betkoskis can obtain summary judgment. They owned the Beacon Heights landfill during the time when Zollo allegedly transported chemical wastes to the site, and would therefore be directly liable under the Act. Moreover, the Betkoskis did not show the absence of

disputed material facts and therefore failed to carry their burden at this stage of the litigation. Joseph Betkoski only claimed that he "never disposed of any waste" at the site and John Betkoski simply stated that he had no knowledge that any hazardous waste was disposed at Beacon Heights. However, the Betkoskis' liability turns on neither their disposal, nor their knowledge of any disposal of hazardous substances at the landfill; it depends solely on their ownership at a time when hazardous substances were deposited at the landfill.

Because we hold that summary judgment was inappropriate, the rulings against the United States and in favor of the Betkoskis and Richard Zollo must be reversed and those cases must be remanded.

CONCLUSION

Accordingly, as indicated, we affirm the judgment appealed from in part, and reverse the judgment, in part, and remand to the district court to conduct further proceedings consistent with this opinion.

APPENDIX

Case-By-Case Review

Review of the grant of summary judgment in 85 cases

A. *Successor Liability Cases*

Earlier we explained the propert test for successor liability under CERCLA. As the district court relied on a different test, we must vacate all grants of summary judgment premised on the absence of successor liability. On remand, the district court should reconsider its decisions in light of today's opinion. Should any material facts remain genuinely disputed, summary judgment should not be granted.

Laurel Park and Beacon Heights Combined Claims:

• Jacob Brothers, Inc.: The district court found that the currently constituted Jacob Brothers, Inc. did not assume the CERCLA liability of a previously formed corporation with the same name. Specifically, in 1925 a corporation named Jacob Brothers, Inc. was formed. This company later became known as Brothers Scrap, Inc. In 1987, a different company, Michael Schiavone & Sons, purchased some of the assets of the original "Jacob Brothers, Inc." The acquiring company then assigned its rights and duties under the acquisition to a newly formed corporation, "Connecticut Iron and Metal, Inc.," which later assumed the name "Jacob Brothers, Inc." Apparently there is a factual dispute over whether this appellee purchased a portion of the former Jacob Brothers' assets or substantially all of its assets. On remand the district court should decide whether, in light of our opinion, there is a genuine material fact in dispute.

• Seymour Brass, Inc.: This appellee, which purchased the "assets and business" of The Seymour Brass Turning Company, was granted summary judgment based on the absence of successor liability.

Beacon Heights Only:

• Connecticut Pharmacare, Inc. d/b/a Ford Pharmacy and Medical Supply: This business acknowledged disposal of general rubbish, including empty boxes, packing materials, empty or broken bottles of cleansers and prescription medicines, empty containers and paper. The president of the corporation denied sending hazardous substances to the Beacon Heights landfill "with the possible exception of such trace substances . . . alleged to be included in general rubbish." Dr. Brown concluded that several hazardous substances were found in the appellee's waste that were also found in both landfills.

The district court ruled against the Beacon Heights Coalition rejecting the proof in the Brown affidavit and ruling that trace amounts of hazardous substances were insufficient to create CERCLA liability. It also rejected the coalition's argument concerning successor liability under CERCLA. We reverse and remand on all three grounds.

• NRS Carting Co., Inc.: The district court granted summary judgment on the question of successor liability. NRS's contention that it was not a successor to Norwalk Refuse Service (Norwalk), but only purchased some commercial customer routes, equipment, and containers from Norwalk, presents a fact question regarding successor liability.

• Zollo Drum Company, Inc. (ZDC): The district court granted summary judgment to ZDC (a corporation run by Anthony Zollo) and rejected the Beacon Heights Coalition's argument that ZDC should be liable for the acts of a prior sole proprietorship operated by Richard Zollo (Anthony's father) which was later sold to ZDC.

B. *Transporter Liability Cases*

The district court rejected the Beacon Heights Coalition's claims against three Beacon Heights appellees—Dee's, Inc., Frank Perrotti & Sons, Inc., and Manafort Brothers,

Inc./Connecticut Waste Processing, Inc.—partly for the same reasons it rejected the claims against the generators and partly because the court found that these transporters did not select the site of disposal. On remand, the district court should consider whether summary judgment remains appropriate in these three cases in light of our discussion of transporter liability and the other issues addressed in our opinion.

C. Sua Sponte *Dismissals*

As noted, the district court dismissed claims *sua sponte* against 32 appellees (listed below) for "want of substantiation." While district courts have authority to take such action in complex cases involving dozens of summary judgment motions, the district court could not grant *sua sponte* summary judgment without giving the coalition notice and an opportunity to adduce evidence in opposition. Here, because these appellees made no motion for summary judgment, no opposition papers were prepared by the coalitions. This procedure leaves us without the benefit of a record in these cases.

These 32 *sua sponte* grants of summary judgment must be reversed and the trial court may again consider *sua sponte* summary judgment after giving appellants ten days to come forward with their evidence. It should then consider that evidence in light of the legal standards we have enunciated and determine if summary judgment is appropriate.

•• *Laurel Park and Beacon Heights Combined Claims*:

• Ashmore Trucking Company, Thomas Ashmore, George Clark, Gerald Metals.

•• *Laurel Park Only*: John Ashmore, Northeast Utilities/ Connecticut Light & Power Co., Quality Rubber Products.

•• *Beacon Heights Only*: Armand's Auto Service, Beacon Outing Club, John Betkoski, Edward Betkoski, Boise

Cascade, Brass Rail Restaurant/Cafe, Capozziello Brothers, C.R. Gibson, E. Eric Arsan Refuse, Elk's Lodge # 967, George's Floor Covering, High Ridge Homes/ Apartments, Korvette Services, Latella Carting Co., Long Meadow Cafe, Nelson Mendes, Naugatuck, Y.M.C.A., Peter Paul Cadbury, Ray's Hardware, David Rupsis, Sperry Rand Corporation, Triangle Services, Turner Construction, Vieria Agency.

D. *Municipal Generators*

The district court considered the municipal appellees as a single group and granted summary judgment dismissing the coalitions' actions against them. In so doing it ruled that wastes that were not themselves listed as hazardous, but which incorporated components that were hazardous wastes, did not bring disposers of such waste within CERCLA. The court also ruled that liability does not lie if the waste disposed of would release a hazardous substance only on the intervention of another force. Further, it weighed the Brown affidavit with other evidence and found it wanting. In our view these rulings were error.

"Liability under CERCLA depends only on the presence in any form of listed hazardous substances." *Murtha I*, 958 F.2d at 1201. The district court, in support of its holding, stated that the coalitions "provided no analysis or authority to the contrary." *Murtha III*, 840 F. Supp. at 188. But in fact, the Beacon Heights Coalition referred the court to the very passage in *Murtha I* just quoted.

The second ruling erroneously required the appellants to prove causation for the release. Further, in weighing the Brown affidavit against the backdrop of the EPA Municipal Policy and deciding against pursuing the municipal generators as potentially responsible parties, the trial court found that spot checks conducted by the municipalities "substantially undercut" Brown's affidavit. *Murtha III*, 840 F. Supp. at 189. This is precisely the sort of weighing of evidence in which courts may not engage when deciding

summary judgment motions. *See United States v. Rem*, 38 F.3d 634, 644 (2d Cir. 1994) ("On a motion for summary judgment, the court is not to weigh the evidence or . . . resolve issues of fact, but only to determine whether there are issues to be tried."). Moreover, the EPA's decision whether or not to charge these appellees as potentially responsible parties is not relevant when determining liability.

We remand as to the following 19 municipal generators:

•• *Laurel Park and Beacon Heights Combined Claims*: Town of Beacon Falls, Town of Bethany, Connecticut Resource Recovery Authority, Town of Hamden, Town of Killingworth, Town of Middlebury, Borough of Naugatuck, Town of Orange, Town of Plymouth, Town of Seymour, Town of Thomaston, City of Waterbury.

•• *Laurel Park only*: New Haven Housing Authority, Watertown Housing Authority, Town of Watertown, Town of Woodbury.

•• *Beacon Heights only*: City of Milford, Town of Stratford, Town of Westport.

E. *Remaining Cases*[7]

1. *Laurel Park and Beacon Heights Combined Claims*

There are 27 remaining cases for which a brief explanation follows:

• Adams Service Station (Adams): This motorcycle and snowmobile business was managed by Stanley P. Radauskas from 1954 until 1982. Radauskas explained that the service station disposed of "cardboard boxes, miscellaneous packing materials, and a small amount of paper office trash." In deposition testimony, he also acknowl-

[7] Cases against the following defendants were voluntarily dismissed: P. Francini & Co.; Ideal Manufacturing Co.; Jetzon Tire Co.; Litton Systems, Inc.; and Sanitary Refuse Co.

edged the disposal of windshield cleaning fluid, plastic bags, used paper gaskets from motorcycles, spark plugs, and light bulbs. Radauskas claimed that "none of the [wastes] disposed of by the service station . . . contained any [CERCLA hazardous substances]." After reviewing these facts, Dr. Brown concluded that Adams' waste included lead, trichloroethane, and trichloroethylene, three CERCLA hazardous substances found in the Beacon Heights Landfill.

Although the district court concluded that none of the products disposed of are listed by EPA as hazardous substances, the products have component parts that are hazardous substances. Hence, the waste allegedly disposed of by Adams falls within CERCLA.

• Bristol Flowed Gasket Company (BFGC): BFGC produces metal stampings. Murtha removed BFGC's "general rubbish, including cardboard, [office] waste basket contents, garbage from the company cafeteria, junk mail, and floor sweepings." Dr. Brown concluded that these wastes commonly include several CERCLA hazardous substances, including methylene chloride, benzene, trichloroethane, and diethyl phthalate. All of these substances were found at the landfills.

The district court relied on the EPA's decision not to designate BFGC as a potentially responsible party and also found that no direct evidence of BFGC's disposal of hazardous substances was produced.

• The Coffee Shop: This Waterbury restaurant disposed all of its waste at the Murtha landfills until 1978. The wastes included containers for Clorox, 409 detergent, Drano, Tide soap, Lysol, and Ajax, as well as cleaning rags and towels. It also disposed of plastic wrappings from food packaging material and empty beverage containers. An employee with personal knowledge of the waste disposed by the appellee averred that none of the restaurant's waste contained any hazardous substances. Dr. Brown

concluded that this waste contained xylenes and diethyl phthalate, two hazardous substances found in leachates from both landfills.

The district court stated that because the appellee used the cleaning substances listed above, it made no sense to believe that any of the product would still remain in a discarded container; and since whatever amounts discarded were "minuscule," it granted summary judgment. *Murtha III*, 840 F. Supp. at 184. The trial court also stated that none of the cleaning products is listed as a hazardous substance, and that the mere presence of a named hazardous substance as a constituent element of a product does not make the product a hazardous substance. We reject all of these bases of the decision.

• Crelan Construction: The district court granted summary judgment, saying that the record reflected no evidence that the movant disposed of hazardous substances at either landfill. The Beacon Heights Coalition concluded that Crelan had neither complied with discovery obligations nor submitted an affidavit in support of its motion. The district court did not rule on this contention, nor does either coalition argue that Crelan's alleged failure to comply with discovery provides a basis for reversal. Nonetheless, we vacate and remand for reconsideration in light of our other holdings today.

• First National Supermarkets: The district court found that because no claim was asserted against the appellee in the amended complaint, the case against this defendant should be dismissed. It agreed with appellee that the claim was originally made against FNS-Naugatuck. Because the complaint charged FNS-Naugatuck, apparently a different entity than this appellee, we affirm.

• Horizon Homes: Horizon Homes owned 12 apartment buildings. By all accounts, it disposed of household waste, including Clorox containers, furniture and floor polish containers, pesticide containers and traps, and containers of

ammonia and shampoo. Dr. Brown concluded that this array of waste included several hazardous substances also found in leachates from both landfills.

The district court found that because these containers would ordinarily include only "minuscule residues," *Murtha III*, 840 F. Supp. at 186, there could be no liability. As there is no quantitative requirement for CERCLA liability, the fact that only minimal amounts were generated might be relevant in liability apportionment, but it cannot serve to bar liability entirely.

• Hospital Marketing Services Co. (HMS); HMS contracted for waste disposal exclusively with Murtha from 1977-79 and 1983-87. It manufactured cold packs that contained calcium chloride and (after December 1987) magnesium sulfate. HMS' waste, according to appellants' evidence, included polyvinyl chloride packaging, ammonium nitrate, urea, and medical and office supplies. Dr. Brown concluded that HMS's waste included hazardous wastes found in both landfills, including acetone, phenol, xylenes, trichloroethane, and diethyl phthalate.

The district court granted HMS's motion for summary judgment because none of the products discarded is listed as a hazardous substance and because the Brown affidavit did not identify their composition with specificity. It is hard to know precisely what the district court meant. Dr. Brown looked at the waste discarded and then determined whether it included hazardous substances. It is reasonable to infer that some raw materials were disposed of in the manufacturing process. Even though HMS denied the existence of any proof that it generated hazardous substances, this showing was sufficient to raise a disputed issue of material fact.

• Lombard Brothers, Inc./North Penn Transfer, Inc.: According to the district court, Lombard Brothers, Inc. was acquired by North Penn Transfer, Inc. in 1984, and on February 10, 1992, North Penn Transfer, Inc. filed for

bankruptcy protection. The industrial coalitions did not respond to the summary judgment motion filed by this appellee because of an automatic stay issued by the bankruptcy court pursuant to 11 U.S.C. § 362.

The district court granted Lombard Brothers' motion for summary judgment and dismissed the claim against North Penn Transfer, Inc. without prejudice because of the bankruptcy stay. As the automatic stay protecting North Penn necessarily protects its subsidiary, Lombard Brothers, we believe that the claims against both entities should be dismissed without prejudice until the stay is lifted. We therefore affirm the dismissal without prejudice until the stay is lifted.

• McDonald's Corporation: In their amended complaint, the coalitions sued "McDonald's Restaurant[,] a corporation organized and existing under the laws of the State of Connecticut," and mailed a summons and complaint to "McDonald's Restaurant, Rubber Avenue, Naugatuck, Connecticut 06770." However, no "McDonald's Restaurant" is incorporated in Connecticut. In their motion opposing summary judgment, the coalitions referred to this party as "McDonald's Corporation," but again, no such entity is incorporated in Connecticut, and the McDonald's unit on Rubber Avenue in Naugatuck is not operated by McDonald's Corporation.

McDonald's Corporation moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(4) and (5) for insufficency of process and insufficiency of service of process. As the coalitions did not address this claim, the district court properly granted the motion to dismiss. We affirm.

• Neal's Coffee Shop (Neal Hennessey); Neal's Coffee Shop (until 1977) was a restaurant in Naugatuck, Connecticut that disposed of some 300 lbs. of waste each week, including food packaging, "used, empty, cleansing agent containers and styrofoam products." *Murtha III,*

840 F. Supp. at 189. Dr. Brown opined that such waste included diethyl phthalate, a hazardous substance commonly found in food packaging. Neal Hennessey stated that he "ha[d] no knowledge" of whether his waste included hazardous substances. The district court granted this appellee's motion for summary judgment without explanation. As is clear from the foregoing, material facts remain disputed.

• Portanova Trucking Co., Inc.: This party moved for summary judgment, and neither coalition opposed the motion; Dr. Brown's affidavit is silent as to Portanova. The district court dismissed the action. We affirm.

• Portuguese Club: This Naugatuck, Connecticut social club disposed (according to information provided by Frank Rodrigues, one of its officers) waste that included "toilet area trash, catering/food garbage and bar debris (empty glass bottles and boxes), food by-products from catering operations," and some office waste. Rodrigues averred that, to the best of his knowledge, none of the Club's waste contained any hazardous substances. Based on this, Dr. Brown determined that waste disposed of by the Portuguese Club included several hazardous substances. Despite the factual dispute, the district court granted the Club's motion for summary judgment, finding no evidence that the Club's waste included hazardous substances.

• Shore's Auto Parts: The district court granted summary judgment, commenting that the record contains no evidence that this appellee disposed hazardous substances at Beacon Heights or Laurel Park. See our holding, *supra,* for Crelan Construction.

• Stauffer Chemical Company: This chemical company disposed of office trash, empty paint cans, oil tubes, grease cans, wax containers, floor cement cans and spray containers, and burned light bulbs. According to Dr. Brown,

these and other wastes disposed of contained several hazardous substances that were also found in leachates from the two facilities. The district court granted summary judgment. Appellee reognized that "traces" or "*de minimis*" amounts of hazardous substances might have been discarded.

• Steve's Tire and Battery Salvage: Steve's Tire's waste includes scrap tires. According to the Brown affidavit tires will, under normal landfill conditions, leach methyl ethyl ketone, lead, chromium, toluene, and phenol, all of which were found in both landfill leachates. The district court concluded that tires are not hazardous substances and granted summary judgment. The court had also noted that Brown provides no basis for his opinion that tires release hazardous substances. However, Dr. Brown's affidavit specifically relies on five reports that discuss the types of hazardous substances ordinarily released by tire products and is sufficient to raise an issue of disputed material fact.

• The Stop & Shop Supermarket Company: This food retailer acknowledges disposing of waste that included cardboard, food products, some wood and some plastic, shipping containers, and packaging materials. An employee of the retailer stated that, to the best of his knowledge, this appellee's waste contained no hazardous substances. Dr. Brown, however, considered the waste disposed of by Stop & Shop and found that it included several hazardous substances. The district court granted summary judgment, concluding that the waste disposed of was insufficient to impose CERCLA liability. The Brown affidavit, however raises a genuine dispute over a material fact.

• Trowbridge House Apartments; Valley Mobile Homes Park/Valley Motor Trailer Sales: These appellees both operate residential complexes and each provided a dumpster for the household waste disposed by their tenants. Trowbridge denied any knowledge of the specific wastes that might have been disposed in its dumpster. Dr. Brown

concluded that if the household waste was similar to household waste generally disposed of (an inference unchallenged by the appellee), it contained several hazardous substances found in both landfills. The district court granted summary judgment to Trowbridge. Similarly, as to Valley Mobile Homes Park/Valley Motor Trailer Sales, the district court disregarded Dr. Brown's affidavit detailing the kinds of hazardous substances found in household waste and granted summary judgment.

• Waterbury Pressed Metals, Inc. (WPM): WPM manufactures plumbing specialties and disposed of solid wastes, including paper, scrap rubber, and plastics, and other "ordinary" trash through the Murthas. WPM officials contend that they did not generate any hazardous waste found at the facilities. Dr. Brown concluded that trichloroethane, lead, cadmium, dimethyl phthalate, and diethyl phthalate, hazardous substances all found in Laurel Park leachate, were also in WPM's waste. Despite the disputed facts, the district court found the record "devoid of evidence" that WPM disposed of hazardous waste at ether facility and granted summary judgment.

2. *Laurel Park Only*

• Daddio's: The district court granted summary judgment for the same reasons as in Crelan Construction. See our conclusion, *supra,* in Crelan.

• General Roofing & Sheet Metal Company (General Roofing): General Roofing disposed of "[p]eastone gravel, asphalt rag felt and fiberglass roof insulation." Dr. Brown opined that this waste included benzo(a)pyrene and methyl ethyl ketone, two hazardous substances found in the Laurel Park leachate. The district court found that General Roofing was not liable and granted summary judgment, rejecting "[t]he Brown assumption that a roofer necessarily disposes of [hazardous substances]." However, Brown made no such assumption, but instead considered the information provided by General Roofing in

its response to discovery, determined that hazardous substances were ordinarily found in these wastes, and thereby raised a disputed material fact.

• Nasco, Inc.: Nasco is a service firm that slits coils of metal into narrow widths. In discovery and in a summary judgment affidavit from its president, Nasco admitted that Murtha handled its general trash, including office waste, wooden skids, paper wrappings, some plastics, tin cans, cardboard boxes, and other paper waste. Other waste generated by Nasco, such as dirty rags and steel scrap, were not disposed of in the Beacon Heights or Laurel Park facilities. Based on this information, Dr. Brown concluded that Nasco's waste included dimethyl phthalate, diethyl phthalate, trichloroethane, cadmium, and lead, all hazardous substances. The district court granted Nasco's motion for summary judgment, concluding that the Brown affidavit does not constitute valid evidence.

• U.S. Prolam: U.S. Prolam's operations in Waterbury, Connecticut involve the coating of glass fabric with various resins and electrical lamination. According to U.S. Prolam, it disposed of "inert" edgetrim (epoxy fiberglass), laminate, prepreg, cardboard boxes, scrap metal, and ordinary office supplies. On information and belief, two officials for Prolam stated that they maintained a separate waste disposal process for hazardous substances that was distinct from the disposal of general waste at Laurel Park. Dr. Brown determined that this waste included numerous hazardous substances that were found in Laurel Park. The district court accepted the affidavits from the Prolam officials, stated that the Brown affidavit was unavailing, and granted summary judgment to Prolam. In so doing the court impermissibly weighed the evidence.

3. *Beacon Heights Only*

• Connecticut Sheet Metal Co. (CSM): This company denied disposing "any hazardous wastes" at the Beacon

Heights landfill. However, in deposition testimony, CSM admitted disposing of packaging materials, cardboard boxes, wooden crates with nails or staples, paper wrapping, and other office wastes. On this basis, Dr. Brown concluded that CSM's waste included trichloroethylene, diethyl phthalate, trichloroethane, and lead. The district court granted summary judgment despite the existence of a triable issue.

• Derby Tire Co., Inc.: Derby Tire disposed of scrap tires at Beacon Heights. The district court granted summary judgment because tires are not listed as hazardous substances by EPA. See our conclusion, *supra*, in Steve's Tire.

• Meyers & Schwartz, Inc.: The district court granted summary judgment here for the same reasons that it granted summary judgment to Derby Tire. See our conclusion, *supra*, in Steve's Tire.

• Waterbury Companies, Inc.: Waterbury Companies' business is manufacturing plastic moldings and brass metal stampings. Time-Mist, once a division of Waterbury Companies and now merely a product line, manufactured timed aerosol dispensing devices. This appellee disposed of office waste, including paper, lunch wastes, and damaged plastic goods, in the Murtha landfills. Waterbury denies knowing that "any component of its disposable waste by-product contributed to the pollution" at the facilities. Dr. Brown concluded, based on this evidence, that trichloroethane, diethyl phthalate, and lead—hazardous substances also found in Beacon Heights landfill—were disposed of by this appellee. Despite Waterbury's contentions, the Brown affidavit did not rely on Waterbury's disposal of brass coils, greases, or pesticides. The district court granted summary judgment even though material facts remained genuinely disputed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civ. No. N-87-52 (PCD)

B.F. GOODRICH CO., *et al.*

v.

HAROLD MURTHA, *et al.*

v.

RISDON CORP., *et al.*

December 20, 1993

RULING ON DISPOSITIVE MOTIONS

DORSEY, District Judge.

This case arises out of the use of two sites, Beacon Heights (BH) and Laurel Park (LP), for waste deposits. BH and LP were owned, managed and/or used by the Murtha family and companies controlled by them. Sources' waste was not always deposited in the same site. Nearly 12 years ago, the Environmental Protection Agency (EPA) commenced an inquiry into the responsibility for Hazardous Substances (HS) at the two sites. As to BH, several potentially responsible parties (PRPs) formed a coalition (BHC) to clean up the site and settled with the EPA, Connecticut's Department of Environmental Protec-

tion (DEP) and the Murthas. A consent decree was lodged and entered as a judgment. The Murthas, who had sued a number of potential contributors (TPDs) based on the Comprehensive Environmentl Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, assigned their third party claims to BHC.

A coalition formed later, Laurel Park Coalition (LPC), undertook the same responsibility with respect to LP. By court order it was permitted to pursue contribution against a limited number of TPDs who were TPDs in claims by BHC. Now the TPDs by dispositive motions, all of which will be treated, as did the parties, as motions for Summary Judgment, seek to end the claims against them. BHC and LPC have joined to defend against the motions and have themselves moved for Summary Judgment. The record on which the motions will be decided includes:

a) The third party complaints and the answers thereto;

b) Uniform Discovery Order (UDO) compliances including Murtha transaction documents;

c) Supplemental discovery compliances including transcripts;

d) Affidavits supporting and in opposition to the motions including that of Dr. Brown;

e) The EPA Administrative Record and Decisions;

f) Findings of Fact previously entered herein.

The claims for contribution are controlled by 42 U.S.C. §§ 9613f and 9607 and require proof of the depositing of a HS, § 9601(14), at one or both sites. *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1247-48 (2d Cir. 1992). BHC and LPC have identified subsections B and C of § 9601(14) as the basis of their claims.

EPA has been designated to identify hazardous substances creative of remedial liability, § 9602, which it has

done in 40 C.F.R. § 261.1 on the basis that they are "capable of posing a substantial present and potential hazard to human health or the environment when improperly treated, stored, transported or disposed of." 40 C.F.R. § 261.11(a)(3). "Congress intended that EPA determine whether liability should attach to the disposal of a substance on a substance by substance basis," on the basis of what substances pose a "sufficient danger to the public to be included on the hazardous substance list." *United States v. Serafini,* 750 F.Supp. 168, 171 (M.D.Pa.1990). BHC and LPC have grouped TPDs into groups which are claimed to have, in common, generated waste generically found to include HS, *i.e.,* Construction, Automotive repair and maintenance, Offices, Lawn and Garden, Restaurants and Drugs and Cosmetics.

Certain TPDs, listed in Appendix A, have, on file with the court and/or the document depository maintained by the Special Master, motions which have not been opposed and are not subject to cross motions of BHC or LPC. *See* Plaintiffs' Memorandum of March 12, 1993, pp. 4, 5, 7, 8, 9, 11 and 12; Plaintiffs' Memorandum of March 12, 1993, pp. 8, 10 and 13.

Many comments on the evidence in the Memorandum of Decision of January 12, 1993, are pertinent to the present motions and will not be repeated here.

DISCUSSION:

Summary Judgment is appropriate where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Donahue v. Windsor Locks Bd. of Fire Commr's,* 834 F.2d 54, 57 (2d Cir.1987). If the moving party satisfies "the initial burden of demonstrating that no genuine issue of fact exists . . . the non-moving party must set forth specific facts demonstrating that there is a genuine issue for trial." *B.F. Goodrich Co. v. Murtha,* 754 F.Supp. 960, 962 (D.Conn.1991), *aff'd,* 958 F.2d

1192 (2d Cir.1992) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed. 2d 202 (1986)). All inferences favorable to the non-movant and which may reasonably be drawn from the record, must be drawn in favor of the non-movant.

The motions and cross-motions as to each TPD will be discussed seriatim:

a) Adams Service Station

This TPD operated a motorcycle and snowmobile business and until 1981 sold gasoline. It allegedly disposed of, through Murtha, newspaper, paper towels soiled with windshield cleaning fluid, plastic bags, used paper gaskets, spark plugs and light bulbs. Uncontradicted is movant's evidence that batteries, used oil and filters were otherwise disposed of. Based on the Brown affidavit, that disposal allegedly put lead, trichloroethane and trichloroethylene in BH. None of the products named are listed by EPA as HS. None of the actual products nor the components thereof are the subject of any direct evidence, and the Brown affidavit does not have probative merit in that respect. Questions about the credibility of Mr. Radauskas do not constitute affirmative evidence. For the reasons discussed in *B.F. Goodrich Co. v. Murtha*, 815 F.Supp. 539, 545-46 (D.Conn.1993) as well, there is no genuine issue of material fact as to this TPD's liability. Its motion is granted and the coalitions' motion is denied.

b) Axil Corporation d/b/a Homer D. Bronson Company

This TPD claims that it generated no waste found in BH or LP and that successor liability is inapplicable. Axil merged in 1986 with The Homer D. Bronson Company, a Delaware corporation (Bronson 2). Bronson 2 purchased limited assets of a Connecticut corporation of the same name (Bronson 1). Bronson 2 did not buy or receive any Bronson 1 stock, nor did it assume any of Bronson 1's lia-

bilities. Bronson 1 thereupon changed its name to HDB Corporation which was dissolved in 1987. There was never any identity of officers, directors or shareholders between the two corporations. Bronson 2 did not conduct operations at nor did it purchase the site of Bronson 1's manufacturing. Bronson 2 sent no waste to either BH or LP. It used other landfills. Nothing in the record contradicts these assertions. Axil's motion for Summary Judgement is granted.

c) Bristol Flowed Gasket Company, Inc.

Bristol claims it disposed of no HS at BH or LP, supporting its contention by the affidavit of Charles A. Rafferty, Jr. He asserts the waste removed by Murtha included no HS. Anything which might be the source of HS which the coalitions attribute to it was otherwise disposed of. It was not designated as a PRP by the EPA. BHC and LPC have shown no direct evidence that Bristol disposed of HS at either site. They cite the nature of its business, its generation of waste from which HS could be derived and removal of waste by Murtha. There is no evidence, direct or circumstantial, from which it could be found that Bristol disposed of HS at either site. Removal of waste by Murtha does not prove what was in the waste, and no evidence counters Bristol's evidence that any waste which might have contained HS was not disposed of through Murtha. The coalitions' claim that "cardboard, office waste basket contents, [cafeteria] garbage, junk mail and floor sweepings" contained "toluene, phenol, trichloroethane, and diethyl phthalate" is conclusory, unfounded and uncredited. Bristol's motion is granted and the coalitions' is denied.

d) Coffee Shop, The

At most the record reflects movant's running a restaurant in two successive locations. In a stock form, BHC and LPC, based on the use of Clorox, detergent, Drano, soap, Lysol and Ajax, and based on Dr. Brown's affidavit, at-

tribute to movant the disposal of xylenes and diethyl phthalate. Without direct contradiction, movant describes its waste as used paper products, food and drinks. It defies common sense to credit Dr. Brown because any one of the products would be used, not left in discarded containers. For that reason, because any residues of such products in discarded containers has not been shown to be other than minuscule, because none of the products is listed as a HS by EPA and because mere presence of an element, a named HS, as a constituent of a product does not render the product a HS, *B.F. Goodrich Company v. Murtha*, 815 F.Supp. 539, 545-46 (D.Conn. 1993), Movant's motion is granted. The coalitions' motion is denied.

e) Connecticut Pharmacare, Inc. d/b/a Ford Pharmacy

This movant is a corporation formed to purchase, in 1987, all of the assets of Ford. Only Ford dealt with Murtha. Movant is not shown to have disposed of trash at BH or LP through Murtha. Employees of Ford founded movant. Movant continued the business of Ford. BHC and LPC argue that movant cites no authority for excusing it, as a successor corporation, from CERCLA liability. However, they cite no convincing authority for the proposition that movant' situation warrants imposition of such liability. Further, the generic argument, based on the Brown affidavit, and the reasons discussed in d) above require granting movant's motion and denying the coalitions' motion.

f) Connecticut Sheet Metal Co.

Movant allegedly disposed of packaging materials, cardboard, wooden crates, paper and undescribed debris from sheet metal installation. These and wastes from machine maintenance are assertedly the source of HS. For the reasons in a), c), and d) above, movant's motion is granted and the coalitions' motion is denied.

g) Connecticut Waste Processing Inc.; Manafort; Dee's Refuse Inc.; Frank Perrotti & Sons, Inc; Sanitary Refuse Co.

CWPI generated no trash. It transported municipal solid waste (MSW) to BH from Hamden and New Haven, as municipal generators (MG). As movant's only liability is derived from its MSW, under the equitable factors which the court must apply to any contribution, CERCLA § 113(f), any contribution from movant would be based on the same MSW for which the two MGs would be liable. Although transportation of waste brings the problem to the dump site, any HS in the trash originates with the generator. Movant, if liable, would in turn be entitled to contribution from the MGs for any HS it generated. While that right would not extinguish the coalitions' right, the coalitions are not entitled to collect twice. As those MGs are below found not liable, CWPI's motion is granted. The coalitions' motion is denied.

Dee's Refuse, Inc. is claimed to have hauled household waste (HW) and unspecified commercial site refuse, and thus HS, to BH, based on the Brown affidavit. This is not substantiated as discussed in a), c), and d).

Frank Perrotti & Sons, Inc. is alleged to have hauled to BH unspecified MSW from apartment houses, offices, industrial sites and restaurants, identified as containing HS by the Brown affidavit.

Sanitary Refuse Company, Inc. (SRIC) was incorporated as F.P.J. Refuse Service, Inc. on November 12, 1987. On March 2, 1988, FPJ purchased the assets, name and business of a previously existing corporation, The Sanitary Refuse Company, Inc. (TSRCI), incident to which TRSCI and its shareholders, who are unrelated to FPJ, covenated not to compete with FPJ. On March 2, 1988, FPJ changed its name to SRIC and commenced to conduct TSCRI's business, using its former assets, employees and customers. All the waste disposed of, on

which the claim herein is made, was brought to BH prior to May 1979. The customers are not identified nor is there evidence for the basis on which HS is alleged to have been disposed of at BH, except the Brown affidavit. SRIC is described, conclusorily as a successor corporation to TSRCI. Though asserting that the characteristics of SRCI are those "identified by the various courts that have considered successor liability," BHC and LPC memorandum § S2, the only authority cited is *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 244 N.W.2d 873, 883 (1976). Absent convincing authority, successor liability cannot be found to be lawfully imposable on SRIC.

Further to be considered as to the transporters are their argument that they have not been shown to have disposed of specifically identified HS found at the sites, that they were directed to the sites or transfer stations by others and that they have not been shown to have acted as to be liable under either Conn.Gen.Stat. § 22a-452 or the common law and thus are not liable for contribution under CERCLA as claimed. None of these claims have been briefed in opposition to the transporters' motions. The transporters' motions are granted and the coalitions' motion is denied.

h) Crelan Construction Company

The record reflects no evidence that movant disposed of HS at BH or LP. Its motion is granted and the claim against it is dismissed.

i) D'Addio's Auto Parts

For the reason discussed in h) above this motion is granted.

j) Derby Tire Co., Inc. (Whip-It Tire Division)

Movant disposed of scrap tires through the Murtha sites. Per the Brown affidavit, tires (generically) contain

methyl ethyl ketone, toluene, phenol, chromium and lead. Tires are not listed as HS by EPA. Nothing offered shows that HS in tires contributes to the conditions at either site which give rise to CERCLA liability. *See B.F. Goodrich v. Murtha*, 815 F.Supp. at 545-46. Accordingly movant's motion is granted and the coalition motion is denied.

k) First National Supermarkets

As the argument that no claim is asserted against it in the amended complaint is not controverted, the motion to dismiss is granted on that ground. Movant notes that the claim was originally against FNS-Naugatuck, not movant.

l) Horizon Homes Limited Partnership

This movant owned and leased 12 apartment buildings, the waste from which was removed by Murtha. The only specification of the waste is that it included containers for Clorox, floor, nail and furniture polish and remover, cosmetics, pesticides and traps, waxes, cleaners, soap, ammonia and shampoo. As discussed in c) above, these products are used, with the empty containers being discarded in the normal course. The claim, founded on the Brown affidavit, does not warrant a finding of any evidence that anything but minuscule residues would be found in the empty containers. As discussed in c), no basis is provided for a finding that what movant disposed of included HS. Accordingly movant's motion is granted and the coalitions' is denied.

m) Hospital Marketing Services, Inc.

This TPD is alleged to have generated office waste and waste material related to its manufacturing and packaging of hospital products, supplies and instruments, the composition of which is not shown. None of such products are listed as HS by the EPA. Based solely on the Brown affidavit, which does not identify the composition, it is alleged that the waste included acetone, phenol, xylenes, tri-

chloroethane and diethyl phthalate. For the reasons discussed in a), c), and d) above, the motion is granted and the coalitions' motion is denied.

n) Jacob Brothers, Inc.

A corporation by the forgoing name was incorporated in 1925 and became known as Brothers Scrap, Inc. In 1987 Connecticut Iron and Metal, Inc. was incorporated and in 1988 it acquired, in a two-step transaction with another corporation, part of Brothers' assets, including the name Jacob Brothers, Inc. It then assumed that name. It assumed none of Brothers' liabilities except as specified. No CERCLA liability was so specified. It received a right to indemnification for any liability of Brothers. Brothers has since dissolved. The disposal claimed occurred in 1973-74. Movant's evidence suggests the absence of any disposal through Murtha by Brothers. The evidence does not support a finding that Brothers disposed of waste through Murtha. The Murtha documents rather suggest scrap purchases from Murtha, but that would pose a question of fact. For the reasons discussed in b) and d) as to successor liability, the motion is granted and the coalitions' motion is denied.

o) Litton Industries, Inc.

This TPD allegedly disposed of HS from its Winchester Electronics division whose five plants of waste through Murtha. The coalitions identify wastes from which specific HS, based on the Brown affidavit, allegedly were disposed of at BH. General office waste cannot be found to be the source of HS, as the Brown affidavit does not specify the specific material thus disposed of which contained HS. As HS in the form of components and general waste cannot be a ground for imposing liability, no basis for imposing liability on that score has been demonstrated. However, there is enough evidence and specificity of HS as to the materials disposed of to preclude summary judg-

ment in favor of Litton. However the coalitions' motion cannot be granted, as a question of fact is presented. Its motion for sanctions will also be denied, as sanctions are not warranted.

p) Lombard Brothers, Inc./North Penn Transfer, Inc.

Lombard Brothers, Inc. conducted a general freight transfer business until 1984 when it was acquired by North Penn Transfer, Inc. The nature of the transfer is not disclosed. The affidavit in support of the motion suggests that the nature of the business was such that Lombard did not generate HS. The affidavit is not controverted and the motion of Lombard is therefor granted.

North Penn Transfer, Inc. filed a petition in bankruptcy on February 10, 1992 and therefor any claim against it is stayed by virtue of 11 U.S.C. § 362. Accordingly the claim against North Penn will be dismissed without prejudice subject to renewal in the event the stay is lifted and pursuit of the claim in this court is deemed efficacious.

q) McDonald's Corporation

There is no such corporation existing under Connecticut law. There is, apparently such a corporation existing elsewhere than Connecticut, but it is not reflected as registered to do business in Connecticut. The McDonald's restaurant in Naugatuck where service of the complaint is purported to have been made by mail is not operated by McDonald's Corporation. Summonsed and named in the complaint is McDonald's Restaurant. Without addressing the issue of personal jurisdiction or the proper naming of McDonald's Corporation, the coalition dismisses the problem as "purely procedural isues" and seeks sanctions for non-compliance with disclosure requirements. The latter puts the cart before the horse. Until validly brought before the court, there is no obligation to respond to court procedures. For want of any valid opposition to the motion to dismiss, it is granted.

r) Meyers & Schwartz, Inc.

This corporation came into existence in 1981 when it purchased, in compliance with the Connecticut Bulk Sales Act, Conn.Gen. Stat. § 42a-6-101 *et seq.*, a business operated by three unrelated persons. It sold and repaired tires. The claim here is premised on disposal, between 1973 and 1977, of tires which allegedly contained HS. For the reasons discussed in j) above, movant's motion is granted and the coalitions' motion is denied.

s) Municipal Generators (MG)

This group includes Beacon Falls, Bethany, Connecticut Resource and Recovery Authority, Hamden, Killingworth, Middlebury, Milford, New Haven, Orange, Plymouth, Seymour, Stratford, Thomaston, Waterbury and Westport. Their motion is based on the absence of identification of any specific HS listed under 42 U.S.C. § 9601(14) contained in the waste they caused to be disposed of in BH or LP. They contend that only by disposal of specified HS can they be liable to contribute to the remediation cost. The coalition does not dispute that argument but contends that it has so specified and has provided evidence based on which it could reasonably be found that disposal of HS by the group occurred. There is no direct evidence that any municipality's disposal contained particularly identified HS. The coalition relies on the Brown affidavit which summarizes the author's study of MSW from which he concludes that the make-up of the MSW he studied leads to the reasonable conclusion that MSW, generally, contains certain amounts of certain HS.

Movants concede that MSW may include materials which contain elements or components listed by EPA as HS. The argument is thus whether contribution liability can be based on disposal of items not named as HS by EPA, but which contain components or elements which are so named. If so, there is a further question whether

it must be shown that any such component or element separates out of the material in which it is contained, for there must be a release or threatened release of the HS. "[S]ubstances listed as hazardous . . . become statutorily defined as hazardous substances. . . . And the release of them or any constituent of them invokes the response provisions. . . ." Senate Rep. No. 96-848, 96th Cong., 2d Sess. at 24-27 (July 13, 1980), U.S.Code Cong. & Admin.News 1980, at 6119. Contribution liability requires: 1) disposal of a HS, 2) at a site where the HS is found, 3) release or threatened release of the HS, and 4) incurral of remediation costs. *Violet v. Picillo*, 648 F.Supp. 1283, 1289 (D.R.I.1986), *aff'd*, 883 F.2d 176 (1st Cir. 1989). The HS for which responsibility lies is defined in 42 U.S.C. § 9601(14) and requires proof that "waste contains an unspecified quantity of substances designated as hazardous or toxic under the statutes specified in [§ 9601(14)]." *United States v. Wade*, 577 F.Supp. 1326, 1340 (E.D.Pa.1983). Thus it is necessary that the HS be listed as such. Only EPA is authorized to list HS. 42 U.S.C. § 9602. Deference is due EPA's interpretation of CERCLA and adoption of regulations construing CERCLA. *B.F. Goodrich v. Murtha*, 958 F.2d 1192, 1205 (2d Cir.1992). Liability does not lie if the material disposed of would release a HS only on the intervention of another force. *U.S. v. Serafini*, 750 F.Supp. 168, 171 (M.D.Pa.1990). The question here is whether there is a substantial issue of fact, based on evidence in the record, as to MGs having disposed of HS. The coalition relies on the Brown affidavit as such evidence, claiming that MSW, as a general rule, is thereby shown to contain HS.[1] Dr. Brown's affidavit, attached to the coalition's memorandum,

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[1] The coalitions' reliance on *B.F. Goodrich Co. v. Murtha*, 754 F.Supp. 960, 972 (D.Conn. 1991), *aff'd*, 958 F.2d 1192, 1197 (2d Cir.1992) is misplaced. This court's consideration of the Brown affidavit there did not reach its evidentiary efficacy, nor did the Court of Appeals.

in appendix B lists the various types of products found in MSW, none of which are listed as HS by EPA. Though he does not differentiate the components of such among brands, he lists HS attributable to the products. He thus provides a basis from which it could be found that the MSW he studied contained such products and that in turn such products contained, as components or elements, the HS he lists.

The fact that waste contains items which were made with, by use of, or incorporated components or elements which constituted or in turn contained HS is not a sufficient basis for finding that disposal of such waste constitutes disposal of HS. *B.F. Goodrich v. Murtha,* 815 F. Supp. 539, 545-46 (D.Conn.1993). BHC has provided no analysis or authority to the contrary.

The next question is whether Brown's affidavit is sufficient to permit an inference that one or more of the MGs disposed of HS at BH.[2] From the reports of HS found in MSW on which Brown relies, BHC claims an inference that all MSW contains comparable amounts of those HS and that the MGs' MSW contained such HS. Appendix B of the Brown affidavit lists "common products contained routinely in the waste streams of typical households, commercial establishments, institutions and industries . . . and [] the CERCLA [HS] found in each of these products." Brown, p. 9. There is no evidence that any MG's MSW came from the four sources cited by Brown. Brown further notes that products such as he lists will degrade/decompose "under normal landfill conditions" which he does not define. The soundness of BHC's claim must be judged based on the Brown affidavit. Neither the complaint nor the record created for deciding the summary judgment motions identifies a specific HS in the MSW of

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[2] Supporting and opposing affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Rule 56(e), Fed.R.Civ.P.

any MG. A motion for summary judgment challenges not the adequacy of the complaint but whether evidence supports the claim. That requires scrutiny of the Brown affidavit against the backdrop of the EPA Municipal Policy that a MG would not be charged as a PRP absent evidence that its waste deposited at the site in question contained specific HS. 54 Fed. Reg. 51,071, 51,075 (Dec. 12, 1989). The question was not resolved by the earlier decision on the MGs' motion for summary judgment, when the focus was not on the existence of evidentiary support for the claim of HS in waste MGs disposed of, but rather on their liability under CERCLA for disposal of MSW. *See B.F. Goodrich v. Murtha*, 754 F.Supp. at 962. It was assumed for the determination of that motion that MSW contained HS on the basis of Brown, but the validity of Brown as evidence was neither analyzed nor scrutinized.

Without passing on the admissibility of Brown's opinion as adequately founded expertise, *see Daubert v. Merrell Dow Pharmaceuticals, Inc.* ——U.S.——, 113 S.Ct. 2786, 125 L.Ed2d 469 (1993), what is apparent is that no adequate foundation has been laid for Dr. Brown's opinion to be applied to the MGs. He notes reliance on some materials previously held inadequate to establish a defendant's remediation liability, *B.F. Goodrich Co. v. Murtha*, 815 F.Supp. at 545-46. His other sources are not shown to warrant his finding of unspecified HS in the MSW of particular MGs. His references to facts, without specification, in various documents relied on, are insufficient to make his opinions relevant to each or any of the particular MGs. *See Pierson Sand & Gravel, Inc. v. Pierson Township*, 1990 WL 359058 (W.D.Mich., March 2, 1990). His affidavit is "at once second hand and factually sparse." *Chandler v. Coughlin*, 763 F.2d 110, 113 (2d Cir.1985). The following observations are pertinent:

1) The coalition's Appendix A conclusorily states MGs' liability, their disposal of MSW containing HS, relying on Brown. Thereby Brown relies on Brown.

2) Cited affidavits and particular MG's UDO compliance are not shown to be probative of actual or infered presence of HS in an MG's MSW.

3) The UDO compliances of Uniroyal, Murtha and the BHC are not shown to be probative of actual or inferred presence of HS in an MG's MSW.

4) Many factors cited to support claims for contribution are subject to the comments concerning relevance and probative value in *B.F. Goodrich v. Murtha*, 815 F.Supp. at 544-46.

5) Waste generation is used by BHC interchangeably with disposal, ignoring MGs' evidence of arrangements for suspect materials disposal other than at BH.

6) MGs claim spot checks of MSW for materials Brown cites as sources of HS. Such checks, though no guarantee of the absence of HS, substantially undercut his claim of HS in all MSW.

7) BHC claims disposal by MGs at BH despite their disposal through Murtha only after BH was closed.

8) The insufficiency of proof of the presence of HS in the trash of specific businesses based on the type of business they conducted is equally applicable to the MGs which picked up their trash.

9) Brown has suggested that tires will release HS but provides no basis for that opinion. He opines that construction waste contains ten different HS, with no sufficient basis for such being found in the MGs' waste.

Accordingly the MGs' motion is granted. The coalitions' motion is denied.

t) Neal Hennessey d/b/a Neal's Coffee Shop

Movant disposed of used, empty, cleansing agent containers and styrofoam products, not cleansing agents themselves, from which BHC claims disposal of diethyl

phthalate. Its motion is granted. The coalitions' motion is denied.

u) NRS Carting Co., Inc.

BHC alleges successor liability in movant for the disposal of used tires by Norwalk Service, Inc. No meaningful memorandum has been submitted by the coalitions. As discussed above as to disposal of tires and successor liability, and for the further reason that movant has shown, without contradiction that it came into existence after the disposal by Norwalk Service, Inc. and only purchased limited assets of Norwalk Service, Inc., the motion is granted.

v) Old Corner Cafe, Inc.

The only evidence of waste disposed of by this movant does not constitute a basis for finding that it disposed of HS, for the reasons set forth in t) above. Its motion is granted. The coalitions' motion is denied.

w) P. Francini, Inc.

The record reflects no evidence of disposal of HS at BH or LP by this party. Its motion is granted and the case against it is dismissed.

x) Plume & Atwood Industries, Inc./Diversified Industries, Inc.

Plume & Atwood (P & A) is a division of Diversified. Its denial of any disposal of HS at BH is on the basis that any HS generated by its manufacturing process were otherwise disposed of than through Murtha. BHC's only claim of evidence is that P & A's trash hauled by Murtha included graphite bags and used office supplies residue, characterized by Brown as a source of HS. For the reasons discussed herein, Brown's affidavit is insufficient as a basis for finding HS was disposed of by P & A. Its motion for summary judgment is granted and the coali-

tions' motion is denied. That movant may not be subject to a CERCLA claim is not a jurisdictional defect warranting dismissal. That motion is denied.

y) Portanova, Inc., aka Portanova Trucking Co.

The record reflects no evidence of disposal of HS at BH or LP by this movant and accordingly its motion is granted.

z) Portuguese Club, aka Clube Uniao Portuguesa

Movant is a social club. There is evidence of disposal through Murtha of glass and paper waste, empty cleanser and fertilizer containers and garbage, but no HS. This is insufficient to permit a finding of disposal of HS. Its motion is granted. The coalitions' motion is denied.

aa) SCR, Inc.

No record is established which would warrant finding this movant disposed of HS at BH or LP. Accordingly its motion is granted.

bb) Seymour Brass, Inc.

Contribution is claimed from Seymour as successor to Seymour Brass Turning Co. on the basis of its purchase of assets and continuation of the Turning Company's business. There is no showing of identity, and no convincing authority is cited for the proposition that one entity, unrelated to another except as a buyer of assets and business, should be liable for the conduct of the other in disposing of HS. Seymour's motion is granted. The coalition motion is denied.

cc) Shore's Auto Parts

The record contains no evidence of disposal of HS at BH or LP by movant. Accordingly its motion for summary judgment is granted.

dd) Stauffer Chemical Company

In a transparent effort to paint this TPD bleakly, BHS describes it as a manufacturer of chemicals. In fact the waste it disposed of through Murtha came from an office facility which generated waste paper, office supply containers, burned light bulbs, empty cleanser, paint and maintenance material containers and garbage. None of these warrant the finding of disposal of HS at BH or LP. Stauffer's motion is therefor granted. The coalitions' motion is denied.

ee) Steve's Tire & Battery Salvage

Movant concedes disposal of tires through Murtha. As discussed above, tires are not HS, and thus there is no basis for finding movant disposed of HS at BH or LP. Its motion is granted. The coalitions' motion is denied.

ff) Stop & Shop Supermarket Company

Movant allegedly disposed of plastic, food waste, shipping containers, wood, packaging, unspecified damaged products and general office trash. This is insufficient as a basis to find that movant disposed of HS at BH or LP. Its motion is granted. The coalition motion is denied.

gg) Trowbridge Apartments

This movant allegedly disposed of household trash from 33 apartments over an unspecified period "during the 1970's." The trash allegedly consisted of cleanser containers and papers, which does not provide a basis for finding the disposal of HS at BH or LP. Accordingly, movant's motion is granted and the coalitions' motion is denied.

hh) Valley Mobile Homes Park/Valley Motor Trailer Sales

As household trash is all that was disposed of, these movants' motions are granted for the reasons in gg). BHC's motion is denied.

ii) Waterbury Companies. Inc./Time-Mist, Inc.

Movant concedes disposal, through Murtha, of floor sweepings from its plastic molding, brass stamping and aerosol dispensers plant. Metal waste was salvaged and sold, but plastic scrap, paper, food waste and office trash was disposed of through Murtha. Liquid waste was not. Though BHC notes the use of HS in movant's processes, there is no evidence of the disposal of any such through Murtha. Movant's motion is granted. The coalitions' motion is denied.

jj) WPM, Inc.

The record is devoid of evidence of disposal of HS at BH or LP. That attorney Seiger stalled a deposition, noticed 6 days before the discovery deadline, does not excuse a failure to deal with this motion. Rule 37, Fed.R.Civ.P., provides any solace due. Movant's motion is granted.

kk) Zollo Drum Company, Inc. (ZDC)

This TPD was incorporated in 1984, after BH was closed. A prior sole proprietorship was conducted under a comparable name by Richard Zollo. Richard sold the business and related assets to ZDC on December 13, 1984. Anthony Zollo, son of Richard, is president of ZDC. Stock ownership, officerships and directors have not otherwise been put into the record. As a distinct entity is involved and BHC has not cited convincing authority for its claim of successor liability, ZDC's motion is granted. The coalitions' motion is denied.

DISPOSITION OF ANY REMAINING THIRD PARTY CLAIMS

With the multiplicity of parties, enormity of pleadings and dismissal of some third party claims by stipulation, it is possible that some TPDs' dispositive motions have not, by the forgoing, been resolved. The court has fol-

lowed BHC's opposition in making the forgoing rulings. To clear the record, the coalitions shall, within 10 days of this order, file a list of third parties against whom it is claimed that claims remain which the coalitions intend to pursue. In doing so the coalitions shall be sure that the rulings herein and Rule 11 are fully considered and accommodated.

Conclusion

The motion by Jacob Brothers, Inc. to dismiss (doc. #2116) and the motion by Seymour Brass, Inc. (doc. #2097) for summary judgment are granted. The motions by Borghesi Construction (doc. #2127) and Nastro, Inc. for summary judgment (doc. #2118) are denied as moot, as stipulations of dismissal have been entered as to those parties. The remainder of the motions decided *supra* are not docketed.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 1268, 1269, 1270, 1271—August Term 1995

(Petition for Rehearing Filed: February 6, 1997
Decided: April 25, 1997)

Docket Nos. 95-6074, 95-6088, 95-6090, 95-6098

B.F. GOODRICH; UPJOHN COMPANY; DOW CORNING CORPORATION; ENVIRONMENTAL WASTE RESOURCES, INC.; REYNOLDS ALUMINUM BUILDING PRODUCTS COMPANY; UNIROYAL CHEMICAL CO., INC.; WHITE CONSOLIDATED INDUSTRIES; KERITE COMPANY; UNISYS CORPORATION; RISDON CORP.; HOECHST CELANESE CORPORATION; CADBURY BEVERAGES, INC.; COLTEC INDUSTRIES, INC.; KEN-CHAS RESERVE CO.; UNITED STATES OF AMERICA; STATE OF CONNECTICUT; NAUGATUCK GLASS CO.; NAUGATUCK TREATMENT CO.,

Plaintiffs-Appellants,

v.

JOHN BETKOSKI; GEORGE CLARK; ARMSTRONG RUBBER COMPANY; THOMAS ASHMORE; BOROUGH OF NAUGATUCK; BRISTOL FLOWED GASKET COMPANY; CONNECTICUT RESOURCES RECOVERY AUTHORITY; DEE'S, INC., also known as Dee's Refuse, Inc.; DERBY TIRE COMPANY; EASTERN COMPANY; GENERAL ROOFING & SHEET METAL CO., INC.; GERALD METALS, INC.; C.R. GIBSON COMPANY; HOSPITAL MARKETING SERVICES CO., INC.; IDEAL MANUFACTURING CO.; JACOB BROTHERS, INC.; LITTON SYSTEMS, INC., also known as Winchester Electronics; MANAFORT BROTHERS, INC.; NASCO, INC.; NEW HAVEN HOUSING AUTHORITY; NORTHEAST UTILITIES; FRANK PERROTTI & SONS, INC.; QUALITY RUBBER

CO.; SANITARY REFUSE CO., INC.; SEYMOUR BRASS TURNING CO.; SPERRY RAND CORPORATION; STAUFFER CHEMICAL COMPANY; TOWN OF MIDDLEBURY; TOWN OF THOMASTON; TOWN OF WOODBURY; TRIANGLE INDUSTRIES, INC.; TURNER CONSTRUCTION COMPANY; U.S. PROLAM, INC.; WATERBURY COMPANIES, INC.; WATERTOWN HOUSING AUTHORITY; ZOLLO DRUM COMPANY, INC.; ATLANTIC RICHFIELD CO.; ADAM'S SERVICE STATION; ARMAND'S AUTO SERVICE; HIGH RIDGE APARTMENTS; ASHMORE TRUCKING; BEACON OUTING CLUB; BRASS RAIL RESTAURANT; COFFEE SHOP; CRELAN CONSTR. CO.; CT. SHEET METAL/WOOD CO.; DADDIO'S; DAVID RUPSIS; EDWARD BETOWSKI; ELK'S LODGE #967; GEORGE'S FLOOR COVERING; HORIZON HOMES; KORVETTE SERVICES; LATELLA CARTING CO.; LOMBARD BROS., INC.; LONG MEADOW CAFE; MCDONALD'S RESTAURANT; MEYERS & SCHWARTZ; NEAL'S COFFEE SHOPPE; NELSON MENDES; PORTANOVA TRUCKING CO.; PORTUGUESE CLUB; RAY'S HARDWARE; SHORE'S AUTO PARTS; STEVE'S TIRES; STOP & SHOP; TRIANGLE SERVICES; TROWBRIDGE APTS.; VALLEY MOTOR TRAILER SALES; VALLEY MOBILE HOMES PARK; VIEIRA AGENCY; WATERBURY PRESSED METALS; TOWN OF BETHANY; CITY OF WATERBURY; CAPOZZIELLO BROTHERS; TOWN OF KILLINGWORTH; TOWN OF BEACON FALLS; NAUGATUCK Y.M.C.A.; E. ERIC ARSAN REFUSE; JOHN ASHMORE; JOSEPH BETKOSKI; CONNECTICUT PHARMACARE, INC., doing business as Ford Pharmacy; FIRST NATIONAL SUPERMARKETS, INC.; P. FRANCINI COMPANY; TOWN OF HAMDEN; JETZON TIRE CO.; CITY OF MILFORD; NRS CARTING CO., INC.; TOWN OF ORANGE; PETER PAUL CADBURY; TOWN OF PLYMOUTH; TOWN OF SEYMOUR; TOWN OF STRATFORD; TOWN OF WATERTOWN; TOWN OF WESTPORT,

Defendants-Appellees.

Before:

CARDAMONE, WALKER, and MCLAUGHLIN,
Circuit Judges

Per Curiam:

Following our November 1, 1996 decision in this case, *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996), familiarity with which is assumed, defendants-appellees NRS Carting Co., Inc. and Zollo Drum Company, Inc. petitioned for rehearing with respect to our determination that federal common law governs the question of successor liability under CERCLA. Appellees suggest that our choice of federal common law to govern the issue is inconsistent with the approach set forth in *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1 (2d Cir. 1996), for deciding when state law should be displaced in favor of a federal common law rule. We disagree. Although we deny the petition, we write to clarify our prior opinion.

As we noted in *Pescatore*, when determining whether to fashion a special federal rule, we consider "(1) whether the issue requires 'a nationally uniform body of law'; (2) 'whether application of state law would frustrate specific objectives of the federal program[ ]'; and (3) whether 'a federal rule would disrupt commercial relationships predicated on state law.'" 97 F.3d at 10 n.7 (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979)). In conducting this analysis, we bear in mind that absent a "significant conflict between some federal policy or interest and the use of state law," a mere federal interest in uniformity is insufficient to justify displacing state law in favor of a federal common law rule. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87-88 (1994).

Our prior opinion in this matter does not establish a contrary rule. Although we noted the desirability of uniformity in the CERCLA context, our primary reason for adopting a federal common law rule was our concern that

allowing state law rules such as the inflexible and easily evaded "identity" rule to control the question of successor liability would defeat the goals of CERCLA.

Each of the *Kimbell Foods* factors supports our decision—there is a significant need for a uniform rule, allowing lenient state law rules to control would defeat federal policy, and we perceive no danger that our decision to adopt a federal rule of "substantial continuity" will unduly upset existing corporate relationships.

With this clarification, the petition for rehearing is hereby denied.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15 day of May one thousand nine hundred and ninety-seven.

Dkt. No: 95-6074

B.F. GOODRICH, *et al.*

v.

MURTHA, *et al.*

A petition for rehearing filed herein by counsel for the Appellee NRS Carting Company, Inc., Zollo Drum Company, Inc., Memorandum of Amicus Curiae Browning-Ferris, et al, and Memorandum of Amicus Curiae National Solid Waste Management Association and the panel that heard the appeal having denied said petition for rehearing in an opinion filed on 25 April 1997,

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III
Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney

APPENDIX E

Statutory Provisions Involved

1.) CERCLA § 101(21), 42 U.S.C. § 9601(21), provides:

> The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

2.) CERCLA § 107(a), 42 U.S.C. § 9607(a), provides:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other person or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances,
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes

the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i).

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

3.) CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1), provides:

> CONTRIBUTION.—Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a), during or following any civil action under section 9606 or under section 9607(a). Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607.

Supreme Court, U.S.
FILED
SEP 5 1997
CLERK

No. 97-241

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ZOLLO DRUM COMPANY, INC. and
NRS CARTING COMPANY, INC.,

Petitioners,

v.

B.F. GOODRICH; UPJOHN CO.; DOW CORNING CORP.;
HOECHST CELANESE CORP.; REYNOLDS ALUMINUM
BUILDING PRODUCTS CO.; UNIROYAL CHEMICAL CO., INC.;
WHITE CONSOLIDATED INDUSTRIES and
UNITED STATES of AMERICA,

Respondents.

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AMICUS CURIAE BRIEF OF THE NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONERS ZOLLO DRUM CO., INC. AND NRS CARTING CO., INC.

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IN THE

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ZOLLO DRUM COMPANY, INC. and
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AMICUS CURIAE BRIEF OF THE NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONERS ZOLLO DRUM CO., INC. AND NRS CARTING CO., INC.

Pursuant to Supreme Court Rule 37, the National Solid Waste Management Association ("NSWMA") files this *amicus curiae* brief in support of Petitioners' Writ of Certiorari in the

above-captioned case.[1] The written consents of Petitioners, Respondents and the United States to the filing of this brief have been filed with the Clerk.

INTEREST OF *AMICUS CURIAE*

The NSWMA is a voluntary association consisting of over 800 members nationally, and 115 members within the Second Circuit, all of whom are engaged in the business of providing waste handling, transportation and disposal services to municipal, residential and commercial customers. The NSWMA is especially interested in liability issues, particularly those under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 ("CERCLA" or "Superfund"), which affect companies in the waste management business. During the last two decades, as government regulations have become more complex, there has been an unprecedented consolidation of the waste management industry. NSWMA members have acquired the assets of other companies in the solid waste handling, transportation and disposal business, thus increasing the sophistication and efficiency of waste management in this country. Pursuant to the Second Circuit's expansive successor liability ruling, NSWMA members now face significant, unanticipated, unbargained for and expensive, potential CERCLA liability for the prior unrelated actions of the business entities who sold their assets to these individual NSWMA members.

The Second Circuit's ruling is also particularly relevant to NSWMA members because 250 (or 23%) of the sites earmarked for cleanup under CERCLA are landfills that accepted waste from municipal, residential and commercial customers. EPA Proposal for Municipality and MSW Liability Relief at CERCLA Co-Disposal Sites, 62 Fed. Reg. 37231 (1997) (proposed July 11, 1997). In aggregate, the potential

---

1. As required by Supreme Court Rule 37.6, the NSWMA states that counsel for the parties did not author this brief in whole or in part and that there are no other persons or entities, other than the NSWMA and its members or counsel, who made a monetary contribution to the preparation or submission of this brief.

liability for NSWMA members at these 250 sites and others, many of which are now pending in litigation, well exceeds one billion dollars. For these reasons, the NSWMA has a direct and concrete interest in this Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Second Circuit's ruling determined that evolving federal common law, rather than established state law, governs questions of corporate successor liability under CERCLA. The Second Circuit further decided that as a matter of federal common law, questions of successor liability in asset transfers under CERCLA will be determined pursuant to the expansive "substantial continuity" test, which has been rejected by nearly every state. The NSWMA supports the Petition for Writ of Certiorari on the important issue of successor liability under CERCLA for the following reasons.

First, the Second Circuit's ruling misapplied this Court's controlling precedents, *O'Melveny & Myers v. FDIC,* 512 U.S. 79 (1994) and *United States v. Kimbell Foods, Inc.,* 440 U.S. 715 (1979), which establish a strong presumption against the creation of federal common law. Proper application of the *O'Melveny* and *Kimbell Foods* test demonstrates that a federal common law rule of successor liability under CERCLA is unwarranted because: (1) Congress did not, in CERCLA, direct the courts to create a federal common law rule of successor liability; (2) there is no need for a national uniform rule of successor liability; (3) the traditional state law of successor liability is consistent with, and would not frustrate, CERCLA's policies; and (4) a federal common law rule adopting the discredited "substantial continuity" test would supplant the long-standing state corporate law of successor liability, and disrupt established commercial relationships predicated on that state law.

Second, by misapplying this Court's precedent, the Second Circuit has aggravated an existing conflict among the circuit courts, many of which have held that the issue of successor liability under CERCLA should be determined pursuant to state law. The Second Circuit is also in conflict with the majority of circuit courts that hold that state law, and not fed-

eral common law, applies to CERCLA liability questions affecting state-created business entities, including such closely related questions as the capacity of a dissolved corporation to be sued, the liability of limited partners, the validity of an inter-corporate contractual release of CERCLA liability, and the liability of a parent corporation for the actions of its subsidiary.

Third, by misapplying this Court's precedent and adopting the expansive "substantial continuity" test to determine successor liability under CERCLA, the Second Circuit has retroactively upset the well-settled expectations of businesses made in reliance on state corporate successor law, and created uncertainty in both future commercial transactions and in pending CERCLA litigation involving billions of dollars in potential liabilities.

ARGUMENT

I. THE SECOND CIRCUIT MISAPPLIED THIS COURT'S PRECEDENTS IN ADOPTING A FEDERAL COMMON LAW RULE ON THE IMPORTANT ISSUE OF SUCCESSOR LIABILITY UNDER CERCLA.

A. The Second Circuit Failed to Properly Evaluate CERCLA's Language in Determining that Federal Law Governs Successor Liability Under CERCLA.

In *O'Melveny* and *Kimbell Foods,* this Court reinforced the longstanding presumption against the creation of federal common law. In all but the most extraordinary cases, federal courts should not adopt court-made rules to supplement comprehensive and detailed federal regulatory programs, like CERCLA. Within the federal system, the function of weighing and appraising the various issues concerning the nature and scope of liability to impose on various entities "is more appropriately for those who write the laws, rather than for those who interpret them." *O'Melveny,* 512 U.S. at 89 (quoting *Northwest Airlines, Inc. v. Transport Workers Union,* 451 U.S. 77, 98 n. 41 (1981) (quoting *United States v. Gilman,* 347 U.S.

507, 512-13 (1954))); *Accord Atherton v. FDIC*, 117 S. Ct. 666, 670 (1997). The threshold inquiry, therefore, is whether, in CERCLA's comprehensive statutory provisions, Congress directed the federal courts to create federal common law to resolve the issue of successor liability.

CERCLA contains only one directive to apply federal law, on an issue entirely unrelated to corporate successorship. Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), permits a liable party to bring a contribution action to recover costs from another liable party. Section 113(f) of CERCLA specifically provides that:

> Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law.

42 U.S.C. § 9613(f)(1) (quoted in full in Petitioners' Appendix ("Pet. App.") at 91a). Accordingly, in the context of contribution actions among parties determined to be liable, Congress "weighed and appraised" the various issues, and unambiguously provided that the procedures to be followed and the method for allocating costs among those liable parties must be determined by federal law.

In stark contrast, CERCLA's detailed regulatory scheme does not direct the federal courts to create federal common law to define the scope of liability arising from business transactions, including liability for alleged corporate successors. Congress demonstrated its ability to direct that federal common law be used in resolving the procedures for contribution actions under section 113(f). Thus, under *O'Melveny*, Congress must have intended for state law to apply to other issues for which it did not so direct the federal courts, including the issue of corporate successor liability. For this reason alone, it was improper for the Second Circuit to create a federal common law rule of successor liability under CERCLA.

B. The Second Circuit Misapplied the *Kimbell Foods* Test in Determining that Federal Law Governs Successor Liability Under CERCLA.

In the absence of an express Congressional directive, there is a strong presumption against the creation of federal

common law that displaces state law. This presumption can be rebutted only in extraordinary cases after satisfying the following three-part test: (1) whether there is a need for a national uniform body of law; (2) whether application of state law would frustrate the specific objectives of the federal program in question; and (3) whether the application of a federal common law rule would disrupt commercial relationships predicated on state law. *Kimbell Foods,* 440 U.S. at 728-29.

This Court has been especially reluctant to create federal common law rules that preempt well-established rules of state corporate law. In *Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90 (1991), this Court reiterated that the presumption against creating federal common law

> is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state law standards. Corporation law is one such area.

Id. at 98 (citations omitted). *See also Burks v. Lasker,* 441 U.S. 471, 478 (1979) ("Congress has never indicated that the entire corpus of state corporate law is to be replaced simply because a plaintiff's cause of action is based on a federal statute.").

Corporations are creatures of state law, wholly dependent on state law for their existence, rights, powers and liabilities. Accordingly, only in the most extraordinary circumstances should a federal court create a federal common law rule, such as a rule of successor liability, that would preempt state corporate law. *See Anspec Co., Inc. v. Johnson Controls, Inc.,* 922 F.2d 1240, 1245 (6th Cir. 1991). In light of this strong presumption, the Second Circuit misapplied the three-part *Kimbell Foods* test in determining that federal law governs successor liability under CERCLA.

1. There is no need for a national uniform federal common law rule of successor liability under CERCLA.

The Second Circuit provided as its primary rationale for creating an expansive federal common law rule of successor liability under CERCLA that:

> a number of courts have recognized the importance of national uniformity and applied traditional rules of successor liability, rather than the successor liability of a given state.

Opinion of Nov. 1, 1996 ("Opinion"), reproduced in Pet. App. at 20a-21a (citations omitted). The Second Circuit's reliance on the argument that there is a need for a national uniform rule, viewed as the most generic and insignificant federal interest, *O'Melveny*, 512 U.S. at 88, ignores the virtual uniformity of the successor liability doctrine under existing state law. Indeed, the Sixth Circuit in *Anspec* stated that the United States, the party charged with enforcing CERCLA, has acknowledged that "the law in the fifty states on corporate dissolution and successor liability is largely uniform." *Anspec*, 922 F.2d at 1249 (Kennedy, J., concurrence). *Accord Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1501 (11th Cir. 1996). The only area of potential non-uniformity in state law arises from a more expansive rule of successor liability, known as the "substantial continuity" test, adopted by fewer than ten states, and applied exclusively in the products liability context. *See City Management Corp. v. U.S. Chem. Co., Inc.*, 43 F.3d 244, 252 (6th Cir. 1994); *Grand Labs., Inc. v. Midcon Labs of Iowa*, 32 F.3d 1277, 1283 (8th Cir. 1994); *Turner v. Bituminous Casualty Co.*, 244 N.W.2d 873, 877 (Mich. 1976).

Any concern that states in the future will alter their successor liability rules to relieve corporations of CERCLA liability is also unfounded. As Circuit Court Judge Kennedy stated in her concurring opinion in *Anspec*:

> Any fears that states will engage in a "race to the bottom" in their effort to attract corporate business and enact laws that limit vicarious liability are in my opinion groundless. States have a substantial interest in protecting their citizens and state resources. Most states have their own counterparts to CERCLA and EPA and they share a complementary interest with the United States in enforcement of laws like CERCLA that are used to remedy environmental contamination. I see no necessity to cre-

> ate federal common law in this area to guard against the risk that states will create safe havens for polluters.

922 F.2d at 1250 (Kennedy, J., concurrence). In short, the purported need for national uniformity is illusory given the near uniformity of existing state law.

2. Application of the state law of successor liability would not frustrate the policies of CERCLA.

The Second Circuit correctly articulated the two primary purposes of CERCLA. The first policy ensures "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the cost of their actions." Opinion, Pet. App. at 9a (citations omitted). This is known as the "polluter pays" policy. Second, CERCLA aims to facilitate efficient and prompt responses to environmental harm. *Id.* at 10a. Contrary to the Second Circuit's conclusions, use of state law to determine successor liability would facilitate, not frustrate, these CERCLA policies.

A fundamental difference between traditional state law successor liability and the federal common law approach adopted by the Second Circuit is that state law requires the purchasing corporation to have some responsibility for or nexus to the prior actions of the selling corporation for the purchaser to be found liable. State law under the traditional "mere continuation" and "de facto" merger tests ensures this nexus by requiring that the purchasing corporation have common management, officers, directors and stockholders with the selling corporation — *i.e.*, the purchaser is the same corporation in a new corporate form. *Grand Labs.*, 32 F.3d at 1282-83; *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1458 (11th Cir. 1985); *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 439 (7th Cir. 1977). The selling and purchasing corporations are not wholly distinct, and the purchaser is held liable not for the acts of another entity, but for its own acts during a prior corporate life. Therefore, state successor liability rules facilitate CERCLA policies by ensuring that the entity responsible for the harm pays for the harm. Indeed, the Second Circuit apparently endorses this rule by stating that successor liability is meant to prevent a predecessor from benefitting

> from the illegal disposal of hazardous substances and later evad[ing] responsibility for remediation simply by changing the form in which it does business, thereby subverting the Act's purpose of holding responsible parties liable for cleanup costs.

Opinion, Pet. App. at 20a.

In contrast, the expansive "substantial continuity" test adopted by the Second Circuit merely requires continuity of business operations between buyer and seller, as opposed to a continuity of the business entity itself. *Mozingo v. Correct Mfg., Corp.*, 752 F.2d 168, 175 (5th Cir. 1985); *Cyr v. B. Offen & Co., Inc.*, 501 F.2d 1145 (1st Cir. 1974); *Turner*, 244 N.W.2d 873. For these reasons, the majority of state courts routinely reject the "substantial continuity" test as an unwarranted extension of the successor liability doctrine. *See Polius v. Clark Equip. Co.*, 802 F.2d 75, 82 (3d Cir. 1986); *Sylvester Bros. Dev. Co. v. Burlington N. R.R.*, 772 F.Supp. 443, 449 (D. Minn. 1990); 15 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7123.06 (perm. ed. 1996). A purchaser who continues to operate a similar business as the seller could be held liable under the "substantial continuity" test even when the purchaser's ownership and management had no involvement with or responsibility for the prior actions of the seller that caused the environmental harm. This result contravenes the "polluter pays" policy by imposing liability on a corporation not responsible for any injury to the environment. As one commentator stated,

> as between an entirely innocent successor and the Superfund, paid for in the main by the oil, petrochemical, and other industry, it seems more equitable and consistent with the purpose of making the "polluters" pay to have the congressionally designated class of polluters pay, rather than someone unrelated to the risk.

Alfred R. Light, *Product Line and Continuity of Enterprise Theories of Corporate Successor Liability under CERCLA*, 11 MISS. C.L. REV. 63, 78 (1990).

The Second Circuit also failed to demonstrate how imposition of successor liability under the "substantial continuity" test promotes CERCLA's goal of prompt cleanup of environmental harm. To the contrary, the fact-dependent, totality of circumstances "substantial continuity" approach created by the Second Circuit is more likely to result in vigorous, time-consuming litigation on these issues, which will delay rather than expedite remediation. State law, on the other hand, imposes more certain and settled liability principles under the "mere continuation" or "de facto merger" tests, which focus on salient criteria such as stock ownership and management. [2]

3. Application of a federal common law rule of successor liability under CERCLA would disrupt commercial relationships predicated on existing state law.

The purpose of the general rule of non-liability in asset transfers is to promote predictability in corporate transactions and free alienability and transferability of property. *Polius*, 802 F.2d at 83. In particular, "[p]redictability is vital in the corporate field. . . . Major economic decisions, critical to society, are best made in the climate of relative certainty and reasonable predictability." *Id.* Free alienability of property is an equally important policy underpinning state successor liability

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2. The Second Circuit's primary rationale for adopting the discredited "substantial continuity" test was because "[t]he Supreme Court has followed this approach in the labor law context . . . ." Opinion, Pet. App. at 21a (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987)). The rationale for the successor liability rule adopted in *Fall River* is inapplicable to CERCLA for two primary reasons. First, a successor liability test, such as "substantial continuity," which focuses on retention of employees and management is perfectly appropriate under the National Labor Relations Act, where the primary purpose is to protect employee expectations. In contrast, mechanically imposing a "substantial continuity" test under CERCLA constitutes a retroactive abrogation of fixed business arrangements that would disrupt, rather than protect, settled expectations. Second, *Fall River* merely imposes a duty on the employer to bargain with the predecessor union; it does not impose a duty to honor existing union contracts, let alone an unknown, contingent monetary liability on a purchasing corporation. "Substantial continuity" under CERCLA, by contrast, would impose direct monetary liability, of an unknown amount, on an asset purchaser.

law. To this end, the general rule of non-liability under state law encourages desirable commercial transactions by reducing the buyer's risk of loss and uncertainty concerning the value of the assets purchased, making buyers and sellers more willing to enter into the asset transaction.

At the same time, traditional state corporate law recognizes the need to protect creditors from corporate transactions designed to avoid liability. For this reason, state successor liability doctrine strikes an appropriate balance between these competing policies by reinforcing the general rule of non-liability in asset transactions and at the same time creating narrow exceptions to this general rule where there is a need to prevent a creditor from unjustly being left with no recourse. For decades, NSWMA members and other asset purchasers have engaged in asset acquisitions in reliance on this settled, developed, easily discovered and applied traditional rule of non-liability in asset transfers. Indeed, the price paid by the buyers to the sellers in these transactions reflected the parties' understanding of who would be responsible for the sellers' liabilities.

In contrast, the Second Circuit's creation of an expansive new rule of successor liability under CERCLA using the "substantial continuity" test, which will be imposed retroactively on transactions completed decades ago, undeniably disrupts these prior commercial relationships predicated on established state law. For example, an expansive rule of successor liability violates the recognized policy that there is a need for certainty in transactions because it increases the purchaser's risk of unanticipated liabilities. "The imposition of successor liability on a purchasing company long after the transfer of assets defeats the legitimate expectations the parties held during negotiation and sale." *Polius,* 802 F.2d at 83. CERCLA liability creates particular uncertainty because of contingencies regarding the extent and cost of cleanup, the allocation of liability among responsible parties, and the presence of potential "orphan shares" attributable to insolvent and defunct entities. In short, the Second Circuit's adoption of an expansive federal rule of successor liability will displace and negate

decades of well-established state law on successor liability, on which businesses properly have long relied.

II. THE SECOND CIRCUIT'S MISAPPLICATION OF THIS COURT'S PRECEDENT IN ADOPTING A FEDERAL COMMON LAW RULE OF SUCCESSOR LIABILITY UNDER CERCLA HAS CREATED A SQUARE CONFLICT AMONG THE COURTS OF APPEALS.

In choosing to create a federal common law of successor liability under CERCLA, the Second Circuit also created a square conflict among the courts of appeals on the issue of successor liability and on a variety of closely-related CERCLA liability issues regarding state-created business entities. Although the Second Circuit's creation of a federal common law of successor liability under CERCLA is consistent with the opinions of three other courts of appeals,[3] it conflicts with the decisions in the First and Sixth Circuits. *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 408-09 (1st Cir. 1993); *Anspec*, 922 F.2d 1240; *City Management*, 43 F.3d at 250. This split among the circuit courts persists even after *O'Melveny* due to the Second Circuit's opinion and other opinions discussed below.

The Second Circuit ruling also creates a square conflict with the decisions of the courts of appeals on four closely-related CERCLA liability issues concerning corporate law. First, on the threshold issue of whether a business entity is legally cognizable and subject to CERCLA claims, the courts of appeals have consistently relied on state law. In particular, the Seventh, Eighth and Ninth Circuits applied state corporate law to determine the capacity of a dissolved corporation to be sued under CERCLA. *Citizens Elec. Corp. v. Bituminous Fire*

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3. *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992); *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1263 (9th Cir. 1990); *Smithland & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91-92 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989). The Ninth Circuit recently heard oral argument on whether *Louisiana Pacific* is still good law after *O'Melveny*. *Atchison, T. & S.F. Ry. Co. v. Brown & Bryant, Inc.*, No. 96-15524 (9th Cir. argued May 8, 1997).

& Marine Ins. Co., 68 F.3d 1016, 1019-20 (7th Cir. 1995); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987); *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 746 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). In light of these opinions, the Second Circuit's ruling creates the anomaly that state law determines whether a corporation has the capacity to be sued in the first instance, but federal common law is determinative on the issue of successor liability. By way of example, state law applies to situations where a CERCLA claim is made against a company that dissolved, but has not transferred its assets, while federal common law applies where a claim is made against a company that transfers its assets before dissolving.

Second, the Eleventh Circuit applied state law rather than federal common law to determine the analogous issue whether limited partners are liable for the acts of a limited partnership under CERCLA. *Redwing*, 94 F.3d at 1501-02. In *Redwing*, a case decided after *O'Melveny*, the Eleventh Circuit applied the *Kimbell Foods* test and held that, given the popularity of the limited partnership structure as a means of organizing businesses, "we hesitate to upset the expectations investors have under current state law rules by adopting a federal common law rule." *Redwing* 94 F.3d at 1502. The exact same concerns militate against the Second Circuit's creation of a federal common law rule of successor liability under CERCLA, which would eviscerate the expectations of investors in perhaps the most common business transaction in this country — asset acquisitions and divestitures.

Third, courts of appeals have consistently relied upon state law to determine the validity and interpretation of contractual releases and indemnifications of CERCLA liability contained in contracts between potentially responsible parties. *Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 212 (3d Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995); *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 15 (2d Cir. 1993); *John S. Boyd Co.*, 992 F.2d at 406; *United States v. Hardage*, 985 F.2d 1427, 1433 (10th Cir. 1993); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457-60 (9th Cir. 1986). Since the corporate successor liability issue, like the contractual release issue,

frequently arises from contractual negotiations over the sale of assets between private parties, the case for applying state law to successor liability issues is as strong as for applying state law to interpret release and indemnification provisions.

Fourth, the Second Circuit ruling threatens to aggravate an existing conflict among the courts of appeals on whether to create a federal common law rule of liability for a parent corporation as the result of the actions of its subsidiary. The Fifth and Sixth Circuits have refused to expand the liability of parent corporations under CERCLA beyond that imposed under existing, well-established, state law governing the piercing of corporate veils. *United States v. Cordova Chem. Co.*, 113 F.3d 572, 576-80 (6th Cir. 1997) (en banc) (cert. petition filed Aug. 8, 1997); *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991).[4] Since the issue of parent/subsidiary liability has traditionally been determined by state corporate law, the Second Circuit's ruling creates further uncertainty whether federal common law will displace these longstanding state corporate law principles.

III. THE SECOND CIRCUIT'S MISAPPLICATION OF THIS COURT'S PRECEDENT IN ADOPTING A FEDERAL COMMON LAW RULE OF SUCCESSOR LIABILITY UNDER CERCLA HAS CREATED UNACCEPTABLE UNCERTAINTY IN PAST AND FUTURE COMMERCIAL TRANSACTIONS AND IN PENDING LITIGATION.

The Second Circuit's ruling creates enormous uncertainty in both past and present commercial transactions and in pending litigation. Asset acquisitions and divestitures are among the most common commercial transactions. For decades prior to the enactment of CERCLA, NSWMA members and other parties to countless legitimate asset transfers predicated these transactions on the well-settled, traditional state corporate law

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4. *But see Schiavone v. Pearce*, 79 F.3d 248, 254 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991).

rule of non-liability in asset transfers, subject only to very limited, universally known, exceptions. Because CERCLA itself imposes retroactive liability for activities that took place well before its enactment, the Second Circuit's adoption of an expansive federal common law rule of successor liability under CERCLA will unfairly deprive these very commercial actors of their justified reliance on these traditional state corporate law doctrines. The Second Circuit's desire to increase the number of responsible parties under CERCLA to defray remediation costs simply does not justify eschewing these traditional state corporate law doctrines.

The Second Circuit's ruling also wreaks havoc on the ability of businesses to structure future commercial transactions. As stated *infra*, the states' successor liability doctrine was carefully crafted over decades, and is now virtually uniform. For this reason, commercial actors structured their business transactions against this settled state common law backdrop. In direct contrast, state courts have discredited the expansive federal common law rule of "substantial continuity" under CERCLA endorsed by the Second Circuit. Moreover, those federal courts that have adopted the "substantial continuity" test have applied it inconsistently. Profound disagreements about the content of the federal common law of CERCLA successor liability exists, and the lower courts directly contradict each other on threshold issues regarding the scope and predicates for successor liability under the "substantial continuity" test. Petition for Writ of Certiorari at 15-18 (discussing cases). Using state successor liability doctrine as a guide, it will be decades before there is a coherent and consistent body of federal common law of successor liability under CERCLA. Accordingly, commercial actors attempting to structure business transactions in the future cannot know what the federal common law in a particular court will require and how it may differ from state corporate law that will continue to govern all other aspects of the proposed transaction. The end result is that commercial transactions will either be made without the ability to accurately assess potential future liability, or in many cases, will be avoided.

Assuming, *arguendo,* that a consistent federal common law rule of successor liability endorsing "substantial continuity" is developed, this expansive rule of successor liability will in and of itself have a chilling affect on asset transfers. A rational prospective purchaser will be reluctant to acquire the assets of a business because, as stated above, it will be extremely difficult to predict or project with any degree of accuracy the contingent liabilities of the seller at all locations where it has ever in the past disposed of, treated or used hazardous substances in any phase of its operations. Quite often these contingent liabilities will exceed or even dwarf the value of the purchased assets, thus rendering the assets worthless, and making purchasers unwilling to consummate the transaction. Similarly, under an expansive successor liability rule, a company that desires to cease its operations and sell its assets will have a difficult time locating a single buyer for all of its assets at a favorable price. Instead, the selling company will be forced to sell its assets piecemeal at a less advantageous price. *Polius,* 802 F.2d at 83. The net result is that assets will not be sold or purchased at their true value, and "the benefits of alienability will be lost to commerce . . . ." *Id.* Asset purchasers will also be unwilling to acquire a fully integrated business unit from a seller for fear of being saddled with successor liability. Instead, valuable assets will be left to whither on the vine, with a net loss to the seller who is unable to realize the full value of its business unit in a sale. This in turn will result in an economic loss to society.

Finally, the issue of successor liability arises in the vast majority of pending CERCLA cases as a result of the ubiquity of asset transfers and CERCLA's retroactive reach. Billions of dollars of remedial costs are at stake in these cases. Unless the Second Circuit is overturned, the shadow of the Second Circuit's expansive liability opinion will, at a minimum, require extensive additional litigation and transaction costs regarding this fact-dependent inquiry, and may improperly and finally determine many of these successor liability issues.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

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No. 97-241

In the Supreme Court of the United States

OCTOBER TERM, 1997

ZOLLO DRUM COMPANY, INC. AND
NRS CARTING COMPANY, INC., PETITIONERS

v.

B.F. GOODRICH CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether corporate successor liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, is governed by federal or state law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 99 F.3d 505. The opinion of the court of appeals denying a petition for rehearing (Pet. App. 84a-87a) is reported at 112 F.3d 88. The opinion of the district court (Pet. App. 63a-83a) is reported at 840 F. Supp. 180.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1996, and a petition for rehearing was denied on April 25, 1997 (Pet. App. 84a-87a). The petition for a writ of certiorari was filed on July 23, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, "is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). Congress enacted that statute to address concerns over the severe environmental and public health effects from releases of hazardous substances, especially at abandoned and inactive waste disposal sites. See H.R. Rep. No. 1016, 96th Cong., 2d Sess. Pt. I, at 22 (1980).

CERCLA establishes a basic framework for government action in response to releases and threatened releases of hazardous substances. Section 104(a) authorizes the President of the United States to respond directly to releases or threatened releases by undertaking "removal" and "remedial" actions in conformity with the National Contingency Plan (NCP). 42 U.S.C. 9604(a).[1] Section 105 directs that the NCP shall include a National Priorities List (NPL) identifying the sites that pose the most serious need for cleanup. 42 U.S.C. 9605; see 40 C.F.R. Pt. 300 (setting out the NCP and NPL). Section 106(a) grants the President authority to issue orders, or to seek judicial injunctive relief, to compel persons to respond to releases or threats of release. 42 U.S.C. 9606(a).

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[1] CERCLA grants authority to the President, who has delegated most of the authority for administering CERCLA to the Administrator of the Environmental Protection Agency. See Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987), *reprinted in* 42 U.S.C. 9615 note.

CERCLA also provides a mechanism for financing government-initiated cleanups of sites that contain hazardous substances. Upon satisfying statutory conditions, the United States may use the "Hazardous Substance Superfund" as the initial source of funding for federal response actions. See CERCLA §§ 101(11), 104, 42 U.S.C. 9601(11), 9604; 26 U.S.C. 9507. The United States may then bring judicial actions against responsible parties under Section 107 to recover "all costs of removal and remedial action" and replenish the Superfund. 42 U.S.C. 9607(a)(4)(A). Section 107 also allows parties other than the federal government to recover "necessary costs of response" in certain circumstances, while Section 113 allows liable parties to seek contribution from other liable parties. See CERCLA § 107(a)(4)(B), 42 U.S.C. 9607(a)(4)(B); CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1).

The United States is entitled to cost recovery under Section 107 if it establishes four basic elements that Congress has determined justify the imposition of liability. Section 107 requires a showing that: (1) there has been a "release" or "threatened release" of "hazardous substances" from a site; (2) the site is a "facility"; (3) the release or threatened release has caused the United States to incur "response costs"; and (4) the defendant is a party who, under the standards that Congress has set out in CERCLA, is responsible for the incurring of those costs. CERCLA § 107(a), 42 U.S.C. 9607(a); see, *e.g.*, *B.F. Goodrich Co.* v. *Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992); *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1379 (8th Cir. 1989).

Section 107(a) specifically identifies four categories of parties who are potentially liable for response

costs. They are: (1) current owners and operators of a facility at which there has been a release or threatened release of a hazardous substance; (2) persons who owned or operated the facility at the time of disposal of a hazardous substance; (3) persons who arranged for disposal or treatment of a hazardous substance at the facility; and (4) persons who selected the site and transported hazardous substances to the facility. CERCLA § 107(a)(1)-(4), 42 U.S.C. 9607(a)(1)-(4). The statute defines "person" to include, *inter alia*, a "firm, corporation, association, partnership, consortium, joint venture, [or] commercial entity * * *." 42 U.S.C. 9601(21).

The courts have consistently ruled that, once the United States has established the four elements of CERCLA liability, the responsible party is strictly liable, without any additional showing of causation, for the government's response costs. *E.g.*, *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *Aceto Agric. Chems.*, 872 F.2d at 1377; *United States* v. *Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

The courts have also consistently ruled that, if the harm from the release of hazardous substances is indivisible, the responsible parties are jointly and severally liable. *E.g.*, *Kayser-Roth*, 910 F.2d at 26; *R.W. Meyer*, 889 F.2d at 1507; *Aceto Agric. Chems.*, 872 F.2d at 1377; *Monsanto*, 858 F.2d at 172. Responsible parties may obtain an equitable allocation of costs by seeking contribution from other responsible parties. CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1). See *R.W. Meyer*, 889 F.2d at 1507; *Monsanto*, 858 F.2d

at 173; see also H.R. Rep. No. 253, 99th Cong., 2d Sess. Pt. I, at 79 (1986).

2. This action arises from efforts to clean up contamination at the Beacon Heights and Laurel Park landfill sites in Connecticut, both of which are listed on the NPL. In 1987, the United States filed suit against Terrance and Harold Murtha, who owned and operated the two landfills. The State of Connecticut's Department of Environmental Protection, the Uniroyal Chemical Company, Inc., and a coalition of corporations led by B.F. Goodrich Company also filed CERCLA actions against the Murthas. The Murthas filed third-party actions for contribution or indemnification against some 200 third-party defendants, including petitioners, who, the Murthas alleged, had generated or transported hazardous substances found at the landfills. See Pet. App. 5a.

In September 1987, the EPA entered into a consent decree for remediation of the Beacon Heights site. A group called the Beacon Heights Coalition, which consisted of 33 potentially responsible parties who had generated hazardous substances deposited at the Beacon Heights landfill, agreed to clean up the site and to reimburse EPA for certain future oversight costs. The Beacon Heights Coalition members who had brought suit against the Murthas also settled those actions. Under the settlement, the Murthas paid $1,875,000 to the Beacon Heights Coalition and assigned their third-party claims to the Coalition. A similar coalition was formed and a similar agreement was reached with respect to the Laurel Park site. Pet. App. 5a-7a.

In April 1992, following litigation over the status of municipal waste generators, the district court, *sua sponte*, decided to allow all of the parties in the

litigation to file motions for summary judgment. Most of the original third-party defendants, including petitioners, filed such motions. The Beacon Heights and Laurel Park Coalitions opposed the motions and cross-moved for summary judgment. At that point in the litigation, the court had effectively restricted discovery to a set of court-drafted interrogatories. In December 1992, after initially denying a request for expanded discovery, the district court allowed limited deposition discovery. Pet. App. 7a-8a.

The district court ruled on the summary judgment motions in a series of orders beginning in December 1993. Pet. App. 8a, 66a-83a. In those orders, the court ultimately granted summary judgment to nearly all third-party defendants who sought that relief, and it dismissed, *sua sponte*, nearly all of the remaining defendants, including many that did not request that relief. *Id.* at 8a. The court granted summary judgment to petitioners, as well as certain other third-party defendants, based on its assessment that they were not corporate successors of liable parties. *Id.* at 79a, 82a.[2]

The court did not articulate a specific standard for determining corporate successor liability. Rather, the court made brief findings as to each of those defendants, sometimes noting whether there was an identity of officers, directors, or shareholders between the predecessor and successor entities. See Pet. App. 67a (stating as to Axil Corporation that "[t]here was never any identity of officers, directors or shareholders between the two corporations"); *id.* at

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[2] The United States did not assert cost recovery claims against petitioners or seek to impose successor liability against any of the other parties.

80a (stating as to Seymour Brass, Inc., that "[t]here is no showing of identity").

In the case of petitioner NRS Carting Company, Inc. (NRS), the court's findings state in their entirety that:

> [The Beacon Heights Coalition] alleges successor liability in movant for the disposal of used tires by Norwalk Service, Inc. No meaningful memorandum has been submitted by the coalitions. As discussed above as to disposal of tires and successor liability, and for the further reason that movant has shown, without contradiction that it came into existence after the disposal by Norwalk Service, Inc. and only purchased limited assets of Norwalk Service, Inc., the motion is granted.

Pet. App. 79a.[3] In the case of petitioner Zollo Drum Company, Inc. (ZDC), the court's findings state in their entirety that:

> This [third-party defendant] was incorporated in 1984, after [the Beacon Heights landfill] was closed. A prior sole proprietorship was conducted under a comparable name by Richard Zollo. Richard sold the business and related assets to ZDC on December 13, 1984. Anthony Zollo, son of Richard, is president of ZDC. Stock ownership, officerships and directors have not otherwise been put into the record. As a distinct entity is

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[3] The court's reference to its prior discussion "as to the disposal of tires" apparently refers to its holdings for Derby Tire Co., Inc., and Meyers & Schwartz, Inc., granting summary judgment to those third-party defendants on issues other than successor liability. See Pet. App. 70a-71a.

> involved and [the Beacon Heights Coalition] has not cited convincing authority for its claim of successor liability, ZDC's motion is granted. The coalitions' motion is denied.

Id. at 82a.[4]

3. The United States, the State of Connecticut, and the Coalitions appealed various aspects of the district court's judgment. The court of appeals affirmed in part, reversed in part, and remanded. The court vacated all grants of summary judgment premised on the absence of successor liability, including those of petitioners, and remanded the case for further proceedings. Pet. App. 49a.

The court concluded that CERCLA subjects the successors of liable parties to CERCLA liability. Pet. App. 19a-20a. The court noted that CERCLA imposes liability on any "person" falling within the four specified categories, CERCLA § 107(a), 42 U.S.C. 9607(a), and that CERCLA defines the term "person" to include a "corporation, association, partnership, consortium, joint venture, [or] commercial entity," CERCLA § 101(21), 42 U.S.C. 9601(21). Pet. App. 20a. Under federally codified provisions of statutory construction, the words company or association "shall be deemed to embrace the words 'successors and assigns of such company or association.'" 1 U.S.C. 5. The court of appeals accordingly concluded that "CERCLA's statutory language, properly read, provides for successor liability." Pet. App. 20a.

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[4] In addition to petitioners, the court granted summary judgment, rejecting claims of successor liability, to Axil Corporation (Pet. App. 66a-67a); Connecticut Pharmacare (*id.* at 68a); Sanitary Refuse Company, Inc. (*id.* at 69a-70a); Jacob Brothers, Inc. (*id.* at 72a); and Seymour Brass, Inc. (*id.* at 80a).

The court of appeals observed that a "number of courts have recognized the importance of national uniformity and applied traditional rules of successor liability, rather than the successor liability law of a given state." Pet. App. 20a-21a. The court also observed that, under the "traditional common law rule," a corporation acquiring the assets of another assumes its liabilities only if "the successor expressly or impliedly agrees to assume them; the transaction may be viewed as a *de facto* merger or consolidation; the successor is a 'mere continuation' of the predecessor; or the transaction is fraudulent." *Id.* at 21a. The court noted that "[b]oth sides agree that this is the standard." *Ibid.*

The parties disagreed, however, over what constitutes a "mere continuation" of the predecessor. Petitioners advocated an "identity" test, requiring "the existence of a single corporation after the transfer of assets, with an identity of stock, stockholders, and directors between the successor and predecessor corporations." Pet. App. 21a. The Coalitions advocated a "substantial continuity" rule, requiring an assessment of whether the successor "maintains the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produces the same products for the same customers." *Ibid.* The court concluded that, "[b]ecause the substantial continuity test is more consistent with the Act's goals, it is superior to the older and more inflexible 'identity' rule." *Id.* at 22a.

The court of appeals conducted a case-by-case review of the grants of summary judgment in an appendix to its opinion. See Pet. App. 49a-62a. In the case of grants involving successor liability, the court

stated that "the district court should reconsider its decisions in light of today's opinion" and that, "[s]hould any material facts remain genuinely disputed, summary judgment should not be granted." *Id.* at 49a. In the case of petitioner NRS, the court of appeals specifically noted, "NRS's contention that it was not a successor to Norwalk Refuse Service (Norwalk), but only purchased some commercial customer routes, equipment, and containers from Norwalk, presents a fact question regarding successor liability." *Id.* at 50a. In the case of petitioner ZDC, the court of appeals merely noted that the district court had "rejected the Beacon Heights Coalition's argument that ZDC should be liable for the acts of a prior sole proprietorship operated by Richard Zollo (Anthony's father) which was later sold to ZDC." *Ibid.*[5]

Petitioners sought rehearing, explicitly challenging for the first time the use of a federal rule of successor liability. Compare Appellees' C.A. Br. 24-31 with Pet. for Rehearing 1-11. The court of appeals denied rehearing in a published order. Pet. App. 84a-87a. The court clarified that the determination whether to apply a federal rule of successor liability depends on whether: (1) the issue requires a nationally uniform body of law; (2) application of state law would frustrate specific objectives of the federal

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[5] The court of appeals' appendix also specifically addresses the summary judgments granted on the successor liability issue to Jacob Brothers (Pet. App. 49a), Seymour Brass (*ibid.*), and Connecticut Pharmacare (*id.* at 50a). The court does not address the summary judgments granted to the Axil Corporation or the Sanitary Refuse Company, Inc. (see note 4, *supra*) in the appendix, but does mention the latter company in the main body of its opinion (Pet. App. 18a-19a).

program; and (3) a federal rule would disrupt commercial relationships predicated on state law. *Id.* at 86a (citing *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728-729 (1979)). The court stated that its decision to adopt the "substantial continuity" test was consistent with the *Kimbell Foods* test because "there is a significant need for a uniform rule, allowing lenient state law rules to control would defeat federal policy, and we perceive no danger that our decision to adopt a federal rule of 'substantial continuity' will unduly upset existing corporate relationships." *Id.* at 87a.

ARGUMENT

Petitioners argue that this Court should grant certiorari to determine whether the court of appeals erred in instructing the district court to apply the "substantial continuity" test when determining successor liability under CERCLA. They assert that the courts of appeals are divided on the issue (Pet. 10-15), and that the conflict has produced an "unacceptable degree of uncertainty" on an "important and recurring" issue (Pet. 15-22). The United States, which does not seek cost recovery based on successor liability in this case, took no position on the question of successor liability before the court of appeals. We agree that the issue has divided the lower courts. This case, however, does not present an appropriate occasion to resolve the question.

1. The courts of appeals have not reached a consensus on the question of successor liability under CERCLA. The court of appeals' decision in this case is consistent with the decisions of the Third, Fourth, and Ninth Circuits, which have held that successor liability under CERCLA should be governed by a

uniform federal rule. *Smith Land & Improvement Corp.* v. *Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989); *United States* v. *Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992); *Louisiana-Pacific Corp.* v. *Asarco, Inc.*, 909 F.2d 1260, 1262-1263 (9th Cir. 1990).[6] The court of appeals' decision is also consistent with a decision of the Eighth Circuit, which indicated that use of a federal rule "was probably" appropriate. See *United States* v. *Mexico Feed & Seed Co.*, 980 F.2d 478, 487 (1992).

The court of appeals' decision is in conflict, however, with decisions of the Sixth Circuit, which hold that state rules of decision should govern successor liability under CERCLA. *City Management Corp.* v. *U.S. Chemical Co.*, 43 F.3d 244, 250 (6th Cir. 1994); *Anspec Co.* v. *Johnson Controls, Inc.*, 922 F.2d 1240, 1246 (6th Cir. 1991) (Kennedy, J., concurring). The court of appeals' decision is also in tension with a decision of the Eleventh Circuit, which holds that state rules of decision govern limited partner liability under CERCLA. *Redwing Carriers* v. *Saraland Apts.*, 94 F.3d 1489, 1500-1502 (11th Cir. 1996).[7]

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[6] The successor liability issue is currently before the Ninth Circuit again in *Atchison, T. & S.F. Ry.* v. *Brown & Bryant, Inc.*, No. 96-15529 (argued May 8, 1997).

[7] Petitioners suggest (Pet. 10-11) that the court of appeals' decision is also in tension with cases involving parent corporation liability under CERCLA. Those cases, however, involve the distinct question—and a separate conflict among the courts of appeals—over whether a parent corporation that actively participates in and exercises control over the day-to-day business of a subsidiary may qualify as an operator of the subsidiary's facility. The Michigan Department of Environmental Quality (MDEQ) and the United States have separately

2. Although there is a conflict among the courts of appeals on the issue presented here, review by this Court is not appropriate at this time. First, the court of appeals' decision in this case is interlocutory and there are no exceptional circumstances calling for its immediate review. Second, the decisions below do not provide an adequate factual record for the Court to conduct a meaningful inquiry into the differences between the proposed standards and the practical consequences of applying one standard rather than the other in the context of the federal liability scheme. Third, the lower courts should be given an opportunity to consider the recent rulings by this Court on related issues, which may affect the persistence of the conflict or clarify the precise points of disagreement among the lower courts.

a. Review is inappropriate at this time because the petition seeks review of an interlocutory order remanding for further proceedings. The Court ordinarily does not grant a writ of certiorari to review interlocutory decisions of the courts of appeals. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967). It takes that step only in the "exceptional case" in which the Court's involvement "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co.* v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893). Accord *Hamilton-Brown Shoe Co.* v. *Wolf*

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petitioned for a writ of certiorari in a case raising that issue. See *United States* v. *Cordova Chem. Co.*, 113 F.3d 572 (6th Cir. 1997), petitions for cert. pending, No. 97-296 (MDEQ petition filed Aug. 8, 1997) and No. 97-454 (United States petition filed Sept. 10, 1997). See p. 8, *supra*.

Brothers & Co., 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree," and the absence of a final judgment may "of itself alone furnish[] sufficient ground for the denial of the application").

This Court's recent decision in *Mazurek* v. *Armstrong*, 117 S. Ct. 1865 (1997) (per curiam), illustrates that principle. That case arose from an interlocutory court of appeals decision that had rendered unenforceable a Montana statute allowing only licensed physicians to perform abortions. The Court noted that it is "ordinarily reluctant" to review an interlocutory decision, *id.* at 1868, but it concluded that the case presented exceptional circumstances warranting review because "the Court of Appeals decision is clearly erroneous under our precedents," "the lower court's judgment has produced immediate consequences for Montana," and it "has created a real threat of such consequences for the six other States in the Ninth Circuit that have physician-only requirements." *Ibid.* This case does not present a comparable situation. The court of appeals in this case merely vacated a grant of summary judgment to several private parties in an ongoing suit. It decided an issue that this Court has not yet had occasion to address, and it applied a standard that is followed by a majority of the courts of appeals that have addressed the question.

The concerns that underlie the Court's ordinary reluctance to grant interlocutory review apply with special force in this case. Petitioners are only two of a large number of parties in the complex ongoing litigation, which addresses complicated claims and liability relationships respecting responsibility for cleanup of two related hazardous waste sites. The

litigation remains at a preliminary stage with respect to threshold questions of liability. The court of appeals reviewed 85 separate summary judgment decisions, most of which will require further proceedings on remand. Those remand proceedings are likely to clarify and narrow the remaining claims, including the liability claims against petitioners. See Pet. App. 49a-62a. If the Court grants review at this time, it will disrupt the progress of the case, which may ultimately be resolved in a way that obviates the need for this Court's review. See *American Constr.*, 148 U.S. at 384 ("many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters").

It is significant in that respect that, while the court of appeals vacated all grants of summary judgment that had been premised on the absence of successor liability, only NRS and ZDC have petitioned for certiorari at this interlocutory juncture. The other parties that are potentially liable on a successor liability theory have elected to go forward in the remand proceedings. See notes 4-5, *supra*. There is no warrant for bifurcating the treatment of the similarly situated parties. Rather, both petitioners and the non-petitioning parties should follow the normal course of appellate procedure. They can preserve their objections, appeal from any adverse final judgment on remand, and, if necessary, seek review from this Court at a later date. See *Hamilton-Brown Shoe*, 240 U.S. at 257-259; *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of a writ of certiorari); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 4.18, at 198 (7th ed. 1993).

b. The decision below is unsuitable for review by the Court at this time because it is not only interlocutory, but it also does not yet provide an adequate record for resolution of the successor liability issue. As noted above, the district court imposed significant restrictions on discovery in this case and granted summary judgment on successor liability without allowing any substantial development of the underlying facts. See pp. 5-8, *supra*. The sparse factual development in this case is relevant to the Court's exercise of discretionary jurisdiction for two reasons.

First, as the court of appeals indicated, the resolution of successor liability issues in this case will require additional factual development regardless of the standard employed. The court of appeals rejected challenges to the district court's restrictions on discovery, Pet. App. 29a-31a, but it instructed that, on remand, "[s]hould any material facts remain genuinely disputed, summary judgment should not be granted," *id.* at 49a. In the case of NRS, the court of appeals specifically stated:

> NRS's contention that it was not a successor to Norwalk Refuse Service (Norwalk), but only purchased some commercial customer routes, equipment, and containers from Norwalk presents a fact question regarding successor liability.

Id. at 50a. In the case of ZDC, the district court itself acknowledged that the factual record respecting this company was limited. *Id.* at 82a. Further factual development on remand may resolve the questions of successor liability and obviate the need for further review in this case. For example, discovery may reveal that petitioners are not successors under any

theory of successor liability. If the Court were to undertake review without allowing additional factual development, its review might effectively result in an advisory opinion.

Second, further factual development is necessary to provide an adequate basis for the Court to evaluate meaningfully the issue that petitioners pose in this case. The Court exercises its Article III functions by deciding discrete controversies among the parties. As the Court has stated in the context of disputes over standing, it decides those controversies "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

The Court's observation in *Valley Forge* is pertinent not only to the question of standing, but also to the Court's discretionary exercise of its certiorari jurisdiction. The Court should be reluctant to review an interlocutory order if the parties have not yet engaged in sufficient factual development to enable the Court to evaluate realistically the consequences of its decision, which is likely to have conclusive nation-wide consequences. In our view, the record in this case is inadequate for the Court to conduct a thorough inquiry into the question of successor liability. The absence of a fully developed record and specific findings would hamper the Court in its analysis of the practical differences between the proposed standards and the actual consequences of applying

one standard rather than the other in the CERCLA context.[8]

c. Petitioners contend that the circuit conflict has created "unacceptable" uncertainty on an "important and recurring" issue. See Pet. 15-22. We believe, however, that petitioners have overstated the need for immediate resolution of the question. Although the question of successor liability does arise in CERCLA litigation, it presents a less pressing issue than the question of parent corporation liability, which has also produced a conflict among the courts of appeals. The Michigan Department of Environmental Quality (MDEQ) and the United States have each filed a petition for a writ of certiorari on that issue in a case that provides a fully developed factual record for this Court's review. See *MDEQ* v. *CPC, Int'l, Inc.*, petition for cert. pending, No. 97-296 (filed Aug. 8, 1997); *United States* v. *CPC, Int'l, Inc.*, petition for cert. pending, No. 97-454 (filed Sept. 10, 1997). The Court should resolve the question of parent corporation liability first before addressing the question of successor liability.

Moreover, to the extent that petitioners are correct that this Court's decisions in *Atherton* v. *FDIC*, 117 S. Ct. 666 (1997), and *O'Melveny & Myers* v. *FDIC*,

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[8] The district court did not conduct an inquiry into the facts relevant to the application of either the "substantial continuity" test or the "identity" test with respect to NRS or ZDC. See Pet. App. 79a, 82a. The district court granted summary judgment without examining, for example, the specific facts respecting the corporate history and character of NRS and ZDC, or the facts relevant to the appropriate choice of law. The district court has not, of course, had an opportunity to develop a record for determining successor liability under the court of appeals' standard.

512 U.S. 79 (1994), provide guidance to the lower courts respecting the propriety of a federal rule of successor liability (Pet. 13-15), the Court should allow the lower courts and the affected parties an opportunity to reconsider and refine their views in light of that intervening authority.[9] That approach will either eliminate the conflict or clarify the precise contours of and the basis for the disagreement, which will aid this Court if it determines that review is warranted. If the issue proves to present a truly important and recurring source of confusion, there will be more appropriate opportunities, involving final decisions and fully developed records, to resolve the matter.

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[9] As petitioners point out (Pet. 8), all of the courts of appeals decisions applying a federal rule of CERCLA successor liability, except the decision in this case, were rendered before this Court's decisions in *Atherton* and *O'Melveny & Myers*. In this case, petitioners' briefs did not bring the *O'Melveny & Myers* decision to the court of appeals' attention until their petition for rehearing. This Court did not decide *Atherton* until after petitioners had filed their petition for rehearing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ZOLLO DRUM COMPANY, INC. and
NRS CARTING COMPANY, INC.,
Petitioners,

v.

B.F. GOODRICH CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Whether federal common law overrides state corporation law limitations on the imposition of successor liability on asset purchasers in cases under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601 *et seq.*

RULE 29.6 STATEMENT

Petitioners Zollo Drum Company, Inc. and NRS Carting Company, Inc. have no parent companies or subsidiaries.

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RTC v. Cityfed Fin. Corp., 57 F.3d 1231 (3d Cir. 1995), *rev'd sub nom. Atherton v. FDIC*, 117 S. Ct. 666 (1997)	3
School Bd. of Nassau Cty. v. Arline, 480 U.S. 273 (1987)	4
Stanford v. Kuwait Airways Corp., 89 F.3d 117 (2d Cir. 1996)	6
Sullivan v. A.W. Flint Co., No. CV 92 0339263, 1996 WL 469716 (Conn. Super. Aug. 5, 1996)	7
Tehran-Berkeley Civ. & Env. Eng'rs v. Tippetts-Abbett-McCarthy-Stratton, 888 F.2d 239 (2d Cir. 1989)	6
Town of Newton v. Rumery, 480 U.S. 386 (1987)	4
United Air Lines v. McMann, 434 U.S. 192 (1977)	4
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Miscellaneous

G. Sisk & J. Anderson, *The Sun Sets on Federal Common Law: Corporate Successor Liability under CERCLA After O'Melveny & Myers*, 16 Va. Envtl. L.J. 505 (1997)	10
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-241

ZOLLO DRUM COMPANY, INC. and
NRS CARTING COMPANY, INC.,
Petitioners,

v.

B.F. GOODRICH CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE PETITIONERS

The United States concedes that the Question Presented —whether federal common law overrides state law limitations on successor liability in CERCLA cases—"has divided the lower courts." Br. in Opp. 11. And the United States makes no attempt to reconcile the court of appeals' decision to create federal common law with *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) and *Atherton v. FDIC*, 117 S. Ct. 666 (1997). Yet despite the undeniable importance of this issue, the United States suggests, on two bases, that the Court not use this case to resolve

the circuit conflict. Neither reason offered by the United States for denying review withstands scrutiny.

The United States' assertion that the Court grants certiorari prior to final judgment only in "exceptional cases" ignores that the Court did just that in both *O'Melveny & Myers* (with the United States' support) and *Atherton*, and that the United States is itself presently seeking review of a non-final order in a CERCLA case. The fact is this Court often grants certiorari to review court of appeals orders reversing summary judgments and remanding for further proceedings.

The United States' claim that "further factual development" is needed to apply even state law successor liability rules ignores the record in this case. As the district court held, the record evidence mandated summary judgments for petitioners under Connecticut law and the standard of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). There is no reason to defer review for "further factual development" which would be relevant only to the federal common law successor liability standard legislated by the court of appeals.

The Question Presented is important and recurring. The circuit split has continued after the Court's unanimous decision in *O'Melveny & Myers*, and will persist until the Court intervenes. The Court should resolve this circuit conflict now.

I. THIS IS AN APPROPRIATE CASE FOR RESOLVING THE QUESTION PRESENTED NOW.

A. The United States claims that certiorari is inappropriate because the court of appeals' decision reversed grants of summary judgment, and remanded for further proceedings. According to the United States,

> The Court ordinarily does not grant a writ of certiorari to review interlocutory decisions of the courts of appeals. It takes that step only in the "exceptional

> case" in which the Court's involvement "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

Br. in Opp. 13 (citations omitted).

This view of the Court's certiorari jurisdiction is too narrow. The Court frequently grants certiorari to review court of appeals decisions which reverse summary judgments and remand, where the appellate decisions squarely present important legal issues which would otherwise justify certiorari.

The Court's two most recent decisions unanimously rejecting a general federal common law both illustrate this. In *Atherton v. FDIC*, 117 S. Ct. 666 (1997), the district court dismissed the RTC's claims against a failed financial institutions' directors, officers and employees. The court of appeals reversed and remanded, "direct[ing] the [district] court to permit the RTC to pursue any claims for negligence or breach of fiduciary duty available as a matter of federal common law." *RTC v. Cityfed Fin. Corp.*, 57 F.3d 1231, 1249 (3d Cir. 1995). This Court granted certiorari and reversed, with no mention of "exceptional" circumstances.

In *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), as here, the district court granted summary judgment on the ground that the FDIC's legal malpractice claims were barred under state law. As in this case, the court of appeals reversed and remanded for further proceedings, ruling that federal common law governed the defenses petitioner had asserted. This Court granted certiorari without any reference to an "exceptional" circumstances test. Indeed, the United States *supported* the *O'Melveny* petition, raising no issue about the "interlocutory" nature of the Ninth Circuit's decision.

On numerous additional occasions, this Court has granted certiorari to review court of appeals decisions

which reversed summary judgments [1] or other dispositive rulings [2] and remanded for further proceedings. The Court did not mention a heightened standard for the grant of certiorari in those cases. *See* 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4036, at 31-32 & n.57 (2d ed. 1988) ("certiorari has been granted to review many nonfinal dispositions without any further explanation"; citing 18 such cases); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 2.2, at 40 (7th ed. 1993); *id.* § 4.18, at 196.

Mazurek v. Armstrong, 117 S. Ct. 1865 (1997) (*per curiam*), on which the United States relies (Br. in Opp. 14), recognizes that "there is no absolute bar to review of nonfinal judgments of the lower federal courts." 117 S. Ct. at 1868. *Mazurek* only referred to "exceptional circumstances" to justify the extraordinary action of *summary reversal* of the court of appeals' decision without merits briefing; the Court's opinion did not suggest such circumstances must exist merely to justify a grant of certiorari.[3]

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[1] *See, e.g., Gilbert v. Homar*, 117 S. Ct. 1807 (1997); *United Air Lines v. McMann*, 434 U.S. 192 (1977); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977); *United States v. Orleans*, 425 U.S. 807 (1976); *Abbott Labs. v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 5-6 (1976).

[2] *See, e.g., Metro-North Commuter R.R. Co. v. Buckley*, 117 S. Ct. 2113 (1997); *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987); *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 277 (1987).

[3] The other cases cited by the United States are inapposite. In *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (*per curiam*), the Court denied certiorari on the petition of parties held in contempt by the district court, where the court of appeals "remanded to the District Court to consider whether there had in fact been a contempt"; the decision states no general rule limiting certiorari jurisdiction. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916), merely held that denial of an earlier, interlocutory petition for certiorari did not limit the scope of the Court's review on a later petition following final judgment. *Id.* at 258. Finally, *American Construc-*

In contrast to its position here, the United States is *presently seeking certiorari* from an appellate decision which resolved legal issues under CERCLA, and remanded to the district court for further factual findings. *See* Petition for a Writ of Certiorari at 14 n.4, *United States v. CPC Int'l, Inc.*, No. 7-454 (filed Sep. 10 1997). It is this petition to which the United States argues this case should defer. Br. in Opp. 18.[4]

In this case, as in *Atherton* and *O'Melveny*, a district court dismissed an action on state law grounds, and the court of appeals reversed and remanded for further proceedings necessary only under a federal common law standard of liability created by the court of appeals. As in *Atherton* and *O'Melveny*, the considerations generally governing this Court's certiorari jurisdiction support review. As in *Atherton* and *O'Melveny*, the Petition should be granted; no further showing of "exceptional" circumstances is necessary.

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tion Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U.S. 372 (1893), was decided when certiorari had been granted in only two prior cases. *Id.* at 384. In light of the modern cases discussed in the text, any restrictions on certiorari suggested by *American Construction* have been modified or limited by more than a century's experience administering the Court's certiorari docket.

[4] The United States successfully argued that a remand for further proceedings did *not* prevent review in *United States v. Orleans*, 425 U.S. 807 (1976):

> The judgment below is interlocutory in the sense that the case has been remanded for further proceedings, *but it is a final determination of the legal issue presented here, which will control future litigation in the Sixth Circuit.* Accordingly, the nonfinality of the judgment below does not bar certiorari review. See, *e.g., Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3; *Land v. Dollar*, 330 U.S. 731, 734, n.2.

Petition for Certiorari at 10 n.8 (filed Aug. 1975) (emphasis added).

B. A single sentence from the Brief in Opposition captures the other principal basis on which the United States opposes certiorari:

> [A]s the court of appeals indicated, the resolution of successor liability issues in this case will require additional factual development *regardless of the standard employed.*

Br. in Opp. 16 (emphasis added); *see also id.* at 18 n.8.[5]

The United States' contention that the district court did not have an adequate factual record to resolve the successor liability issue, *even under the state-law standard the district court applied*, is simply incorrect. In fact, the "further factual development" the Second Circuit required is relevant *only* under the "federal common law" successor liability standard that court created, and does not justify deferring review. The district court had before it all of the evidence necessary to resolve the successor liability claims under Connecticut law, and it correctly did so.[6]

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[5] The United States also argues that the decision below is unsuitable for review because "the district court imposed significant restrictions on discovery," and "granted summary judgment on successor liability without allowing any substantial development of the underlying facts." Br. in Opp. at 16. However, the private respondents challenged the district court's limitations on discovery on appeal, and the Second Circuit rejected these arguments. *See* Pet. App. 29a-31a. No cross-petition has been filed raising this issue.

[6] The United States also suggests "further factual development" is necessary to elucidate "the facts relevant to the appropriate choice of law." Br. in Opp. 18 n.8. However, the district court properly applied Connecticut law here, since no party suggested otherwise. *See, e.g., Stanford v. Kuwait Airways Corp.*, 89 F.3d 117, 122 (2d Cir. 1996); *Tehran-Berkeley Civ. & Env. Eng'rs v. Tippetts-Abbett-McCarthy-Stratton*, 888 F.2d 239, 242 (2d Cir. 1989). In any event, the site is located in Connecticut, the asset purchase transactions occurred in Connecticut, and all of the relevant entities were incorporated and headquartered in Connecticut; the district

Under Connecticut law, "[a] sale of assets by one corporation to another, in good faith and for valuable consideration, does not impose any liability on the buyer for the debts of the seller." *Ricciardello v. J.W. Gant & Co.*, 717 F. Supp. 56, 59 (D. Conn. 1989), citing *Davis v. Hemming*, 101 Conn. 713, 725, 127 A. 514, 518 (1925).

The Connecticut courts have repeatedly held that "[t]he key element" necessary to establish an exception to this general rule "is a common identity of the * * * stockholders in both the selling and purchasing corporations." *National Grange Mut. Ins. Co. v. Montgomery Elev. Co.*, No. CV-91-0501948S, 1994 WL 547747, at *3 (Conn. Super. Sep. 22, 1994).[7] In fact, the Connecticut courts have specifically rejected the "substantial continuity" theory adopted by the Second Circuit *because this test eliminates the continuity of shareholders requirement. Sullivan v. A.W. Flint Co.*, 1996 WL 469716, at *5.

As the district court held, the record entitled both petitioners to summary judgment under Connecticut's successor liability rules.[8] The record—which includes the asset purchase agreements, relevant corporate documents, and testimony and affidavits of principals of the asset buyers and sellers—reveals both transactions were cash-for-assets exchanges, and in both cases there is no overlap between the shareholders of the asset seller and purchaser.[9]

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court's application of Connecticut law is justifiable without "further factual development."

[7] *Accord, Ricciardello*, 717 F. Supp. at 58; *Sullivan v. A.W. Flint Co.*, No. CV92 0339263, 1996 WL 469716, at *5 (Conn. Super. Aug. 5, 1996); *Copperthite v. Pytlik*, No. 59053, 1992 WL 209660, at *3 (Conn. Super. Aug. 25, 1992) ("A continuation envisions a common identity of directors [and] shareholders * * *.").

[8] Indeed, respondents failure to submit *any* evidence in response to NRS Carting's motion arguably would have justified summary judgment even on the expansive federal common law theory adopted by the court below.

[9] The United States also argues that "the district court itself acknowledged that the factual record respecting [petitioner Zollo

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING, AND HAS EVENLY DIVIDED EIGHT COURTS OF APPEALS.

The United States acknowledges that "the issue [presented by the Petition] has divided the lower courts," Br. in Opp. 11, and that the Second Circuit's ruling in this case is in conflict with decisions of the Sixth Circuit, and "in tension" with the Eleventh Circuit's decision in *Redwing Carriers v. Saraland Apartments,* 94 F.3d 1489 (11th Cir. 1996). Br. in Opp. 12. Despite the United States' caviling (Br. in Opp. 12 n.7), the decision below also conflicts with *United States v. Cordova Chem. Co.,* 113 F.3d 572 (6th Cir. 1997) (*en banc*), and with *Joslyn Mfg. Co. v. T.L. James & Co.,* 893 F.2d 80 (5th Cir. 1986), each of which refused to use federal common law to expand parent corporation liability under CERCLA. *See* Pet. 11-13.

The United States downplays the importance and frequent recurrence of the Question Presented. But a survey provided to the Second Circuit (and reproduced in an appendix to this brief) identifies 67 Superfund cases addressing successor liability issues as of December 1996. Nine additional CERCLA successor liability cases not reflected in that survey have now been decided.[10] The

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Drum] was limited." Br. in Opp. at 16 (citing Pet. App. 82a). Yet the district court's recognition that "[s]tock ownership, officerships and directors have not otherwise been put in the record," (*id.*), is simply an acknowledgment that summary judgment was justified because respondents (who had the burden of proof), had failed to provide any evidentiary material in opposition to Zollo's motion. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). The United States cannot use *respondents'* failure to satisfy their obligations under Fed.R.Civ.P. 56 as a basis to defeat this Court's review.

[10] *United States v. Iron Mountain Mines, Inc.,* No. CIV-S-91-768 (E.D. Cal. Sep. 30, 1997); *Chrysler Corp. v. Ford Motor Co.,* 972 F. Supp. 1097 (E.D. Mich. 1997); *Cooper Indus., Inc. v. Agway Inc.,* No. 92-0748, 1997 WL 275075 (N.D.N.Y. May 19, 1997); *North Shore Gas Co. v. Salomon Inc.,* 963 F. Supp. 694 (N.D. Ill. May 5, 1997); *Ekotek Site PRP Comm. v. Self,* 948 F. Supp. 994 (D. Utah

United States' contention that the Petition "presents a less pressing issue than the question of parent corporation liability" which the United States has raised in another case (Br. in Opp. 18) is unsupported and inaccurate.[11]

Finally, the United States argues the Court should permit the lower courts further opportunity "to refine their views" in light of the Court's decision, more than three years ago, in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994). Yet the court below specifically held that its decision to create federal common law was consistent with *O'Melveny*, and the United States acknowledges that this decision conflicts with two other post-*O'Melveny decisions*. Br. in Opp. 12 (noting that decision below conflicts with *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994), and with *Redwing Carriers v. Saraland Apts.*, 94 F.3d 1489, 1500-02 (11th Cir. 1996)). It is clear that *O'Melveny*, alone, has not resolved this conflict; the conflict will persist

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1996); *PMC Inc. v. The Sherwin-Williams Co.*, No. 93 C 1379 (N.D. Ill. Sep. 24, 1996). Indeed, these later decisions show that the opinion below is affecting decisions on CERCLA successor liability in other circuits. *Arizona v. Esco*, No. 93-0937, 1997 WL 259520 (D. Ariz. March 26, 1997); *A-C Reorg. Trust v. E.I. duPont de Nemours & Co.*, No. 94-574, 1997 WL 381962 (E.D. Wis. March 10, 1997); *Gould Inc. v. A&M Battery & Tire Serv.*, 950 F. Supp. 653 (M.D. Pa. 1997).

[11] The United States suggests the Court should first resolve the parent corporation liability issue presented by the pending certiorari petitions in *MDEQ v. CPC International, Inc.*, No. 97-296 (filed Aug. 8, 1997), and *United States v. CPC International, Inc.*, No. 97-454 (filed Sept. 10, 1997). *See* Br. in Opp. 18. But resolution of the narrow issue of statutory construction presented by the *CPC International* petitions will have little relevance to the issue presented in this case—whether creation of a federal common law of corporate successor liability is appropriate. Although the Sixth Circuit's decision in *Cordova Chemical*, 113 F.3d 572 (which is the subject of the *CPC International* petitions), refused to create a federal common law of parent corporation liability under CERCLA, the Petitions filed by the State of Michigan and by the United States do not directly challenge that ruling.

until this Court intervenes, yet again, to restrain "the runaway tendencies of 'federal common law' untethered to a genuinely identifiable * * * federal policy." 512 U.S. at 89.[12]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[12] *See* G. Sisk & J. Anderson, *The Sun Sets on Federal Common Law: Corporate Successor Liability under CERCLA After O'Melveny & Myers*, 16 Va. Envtl. L.J. 505, 551-52 (1997) ("the Second Circuit's decision [in this case] indicates that Supreme Court review will likely be required to lay to rest judicial inventiveness through federal common law under CERCLA").

APPENDIX

APPENDIX

Addendum to the Memorandum of *Amicus Curiae* Browning-Ferris Industries, Inc. in Support of Petition for Rehearing with Suggestion for Rehearing En Banc of Defendants-Appellees NRS Carting Company, Inc. and Zollo Drum Company, Inc. (2d Cir. filed Dec. 12, 1996)

Based on a search of the Westlaw "Allfeds" database (which includes cases from all federal courts) on December 8, 1996, issues of corporate successor liability under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*, were raised in all of the following cases. This listing does not include the two cases involved in this appeal which raise successor liability issues.

I. *Court of Appeals Decisions*

Atchison, T. & S.F. Ry. Co. v. Brown & Bryant, Inc., No. 96-15529 (9th Cir. currently pending)

City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244 (6th Cir. 1994)

John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401 (1st Cir. 1993)

United States v. Mexico Feed & Seed Co., 980 F.2d 478 (8th Cir. 1992)

United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992)

Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991)

Louisiana-Pac. Corp. v. Asarco, Inc., 909 F.2d 1260 (9th Cir. 1990)

Smith Land & Imp. Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988)

II. *District Court Decisions*

Browning-Ferris Indus. of Ill., Inc. v. Ter Maat, No. 92 C 20259, 1996 WL 535539 (N.D. Ill. Sep. 19, 1996)

United States v. Keystone Sanitation Co., No. 1:CV-03-1482 (M.D. Pa. Aug. 22, 1996)

State of N.Y. v. Panex Indus., Inc., No. 94-CV-0400E(H), 1996 WL 378172 (W.D.N.Y. June 24, 1996)

State of Wash. v. United States, 930 F. Supp. 474 (W.D. Wash 1996)

Ninth Ave. Remedial Group v. Allis-Chalmers Corp., 195 B.R. 716 (N.D. 1996)

Stone & Webster Mgmt. Consultants, Inc. v. Travelers Indem. Co., No. 94 Civ. 6619 (RPP), 1996 WL 180025 (S.D.N.Y. Apr. 16, 1996)

Pinal Creek Group v. Newmont Mining Corp., 926 F. Supp. 1400 (D. Ariz. 1996)

City of Toledo v. Beazer Materials & Servs., Inc., 923 F. Supp. 1001 (N.D. Ohio Jan. 22, 1996)

Allwaste Env. Servs./North Atl., Inc. v. Pastore, 911 F. Supp. 29 (D. Me. 1996)

Elf Atochem North Amer. v. United States, 908 F. Supp. 275 (E.D. Pa. 1995)

United States v. Atlas Minerals & Chems., Inc., No. Civ. A. 91-5118, 824 F. Supp. 46, 1993 WL 482952, 1995 WL 510304, (E.D. Pa. Mar. 5, 1993, Sep. 11, 1993, Aug. 22, 1995)

Plaskon Electronic Matls., Inc. v. Allied-Signal, Inc., 904 F. Supp. 644 (N.D. Ohio 1995)

Bethlehem Iron Works, Inc. v. Lewis Indus., Inc., No. Civ. A. 94-0752, 1995 WL 376479 (E.D. Pa. June 20, 1995)

United States v. Pierce, Nos. 83-CV-1623, 91-CV-0039, 92-CV-0562, 1995 WL 356017 (N.D.N.Y. Feb. 21, 1995)

Blackstone Valley Elec. Co. v. Stone & Webster, Inc., 867 F. Supp. 73 (D. Mass. 1994)

State of N.Y. v. N. Storonske Cooperage Co., 174 B.R. 366 (N.D.N.Y. 1994)

Chicago Cutlery, Inc. v. Hurlin, No. C-93-527-JD, 1994 WL 605739 (D.N.H. Oct. 31, 1994)

Kleen Laundry & Dry Cleaning Servs., Inc. v. Total Waste Mgmt., Inc., 817 F. Supp. 225 (D.N.H. 1993, and 867 F. Supp. 1136 (D.N.H. 1994)

Hunt's Generator Comm. v. Babcock & Wilcox Co., 863 F. Supp. 879 (E.D. Wis. 1994)

United States v. Vermont Am. Corp., 871 F. Supp. 318 (W.D. Mich. 1994)

United States v. Lang., 864 F. Supp. 610 (E.D. Tex. 1994)

Gould, Inc. v. Alter Metal Co., No. 91 C 20371, 1994 WL 406576 (N.D. Ill. Aug. 1, 1994)

Northwestern Mut. Life Ins. Co. v. Atlantic Res. Corp., 847 F. Supp. 389 (E.D. Va. 1994)

Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261 (E.D. Pa. 1994)

Charter Township of Oshtemo v. American Cyanamid Co., 876 F. Supp. 934 (W.D. Mich. 1994)

Analytical Measurements, Inc. v. Keuffel & Esser Co., 843 F. Supp. 920 (D.N.J. 1993)

Interstate Power Co. v. Kansas City Power & Light Co., 909 F. Supp. 1241 (N.D. Iowa 1993)

Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc., No. Civ. A. 90-2325-V, 1992 WL 81983, 1993 WL 370817 (D. Kan. Mar. 12, 1992 and Aug. 13, 1993)

Mesiti v. Microdot, Inc., 156 B.R. 113 (D.N.H. 1993)

HRW Sys., Inc. v. Washington Gas Light Co., 923 F. Supp. 318 (D. Md. 1993)

State of Idaho v. M.A. Hanna Co., 819 F. Supp. 1464 (D. Idaho 1993)

Anderson v. City of Minnetoka, No. CV 3-90-312, 1993 WL 95361 (D. Minn. Jan. 27, 1993)

Allied Corp. v. Acme Solvents Reclaiming, Inc., No. 86 C 20377, 1991 WL 283196 (N.D. Ill. May 16, 1991), and 812 F. Supp. 124 (1993)

Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1266 (E.D. Va. 1992)

United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346 (N.D. Ill. 1992)

United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528 (E.D. Cal. 1992)

Bowen Engineering v. Estate of Reeve, 799 F. Supp. 467 (D.N.J. 1992)

Soo Line R.R. Co. v. B.J. Carney & Co., 797 F. Supp. 1472 (D. Minn. 1992)

Waste Mgmt. of Wis., Inc. v. Uniroyal, Inc., No. 91-C-1020-S, 1992 WL 227379 (W.D. Wis. June 2, 1992)

CPC Int'l, Inc. v. Aerojet-Gen. Corp., 777 F. Supp. 549 (W.D. Mich. 1991)

Abbott Labs. v. Thermo Chem, Inc., 790 F. Supp. 135 (W.D. Mich. 1991)

United States v. Distler, 865 F. Supp. 398 (W.D. Ky. 1991)

Con-Tech Sales Defined Ben. Trust v. Cockerham, No. Civ. A. 87-5137, 1991 WL 5944 (E.D. Pa. Jan. 16, 1991)

GNB Inc. v. Gould, Inc., 90 C 2413, 1990 WL 207429 (N.D. Ill. Nov. 30, 1990)

United States v. Western Processing Co., 751 F. Supp. 902 (W.D. Wash. 1990)

Sylvester Bros. Dev. Co. v. Burlington N. R.R. Co., 772 F.Supp. 443 (D. Minn. 1990)

American Nat'l Can Co. v. Kerr Glass Mfg. Corp., No. 89 C 0168, 1990 WL 125368, 1990 WL 129657 (N.D. Ill. Aug. 22 & 30, 1990)

United States v. Chrysler Corp., Nos. Civ. A. 88-341-CMW, 88-534-CMW, 1990 WL 127160 (D. Del. Aug. 28, 1990)

GRM Indus., Inc. v. Wickes Mfg. Co., 749 F. Supp. 810 (W.D. Mich. 1990)

City of Phila. v. Stepan Chem. Co., 713 F. Supp. 1491 (E.D. Pa. 1989)

In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution, 712 F. Supp. 1010 (D. Mass. 1989)

Ametek, Inc. v. Pioneer Salt & Chem. Co., 709 F. Supp. 556 (E.D. Pa. 1988)

Kelley v. Thomas Solvent Co., 725 F. Supp. 1446 (W.D. Mich. 1988)

South Fla. Water Mgmt. Dist. v. Montalvo, No. 88-8038-CIV-DAVIS, 1988 WL 242688 (S.D. Fla. Nov. 8, 1988)

United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987), and Nos. 84-1148C(1), 84-2086C(1), 84-2092C(1), 87-1558C(1), 1988 WL 169818 (Sep. 27, 1988)

United States v. Mottolo, 695 F. Supp. 615 (D.N.H. 1988)

United States v. Vertac Chem. Corp., 671 F. Supp. 595 (E.D. Ark. 1987)

United States v. Nicolet, Inc., No. Civ. A. 85-3060, 1987 WL 11927 (E.D. Pa. May 29, 1987)

United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo. 1985)

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QUESTION PRESENTED

Whether federal common law overrides state corporation law limitations on the imposition of successor liability on asset purchasers in cases under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601 *et seq.*

RULE 29.6 STATEMENT

Petitioners Zollo Drum Company, Inc. and NRS Carting Company, Inc. have no parent companies or subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-241

ZOLLO DRUM COMPANY, INC. and
NRS CARTING COMPANY, INC.,
Petitioners,

v.

B.F. GOODRICH CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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SUPPLEMENTAL BRIEF FOR THE PETITIONERS

Two events which occurred after Petitioners filed their Reply Brief provide additional justification for a grant of certiorari in this case. On December 12, 1997, the Court granted certiorari in *United States v. CPC Int'l, Inc.*, No. 97-454, and *Michigan Dep't of Envtl. Quality v. CPC Int'l, Inc.*, No. 97-296. And on December 30, 1997, the Ninth Circuit decided *Atchison, Topeka & Santa Fe Railway Co. v. Brown & Bryant, Inc.*, No. 96-15529, 1997 WL 792675, which holds that state law, not federal common law, governs successor liability issues under CERCLA.

The grant of certiorari in *CPC* provides additional support for a grant of review in this case, for three reasons. First, in deciding *CPC* the Court may well be required

to determine the Question Presented in this case—whether federal common law should be created in CERCLA cases to override state corporation law. Such an important decision should be based on full briefing and argument of this fundamental issue, as will occur if certiorari is granted in this case also.

Second, answering only the narrow question presented by the certiorari petitions in *CPC*, which concerns the circumstances under which a parent corporation can be held liable as an "operator" under CERCLA based on involvement in its subsidiary's affairs, will not resolve the existing circuit conflict, even in the parent-subsidiary cases. As explained in the Petition, the question whether it is appropriate to create federal common law under CERCLA to override state law arises in a number of related contexts, but most frequently in claims of successor liability. Deciding *CPC* based on the narrow statutory argument advanced by the United States would do nothing to resolve the larger issue whether there is any justification in CERCLA for creating a federal common law of business organizations. Granting certiorari in this case will assure that this issue, which has badly divided the courts of appeals, is decided without further delay.

Third, although the United States' Brief in Opposition in this case argues that certiorari is unwarranted because the lower court remanded for further proceedings, in *CPC* the United States argued the converse—that certiorari was appropriate *despite* the "interlocutory" nature of the lower court's decision. The Court's grant of certiorari in *CPC* shows that the interlocutory nature of the lower court's decision in this case does not justify denial of certiorari.

The Ninth Circuit's December 30 decision in *Brown & Bryant* deepens the circuit conflict concerning whether to create federal common law rules of successor liability under CERCLA. Unlike the decision below, which claimed that *O'Melveny & Myers v. FDIC*, 512 U.S. 79

(1994), *supports* the creation of federal common law under CERCLA, the Ninth Circuit found that *O'Melveny* has undercut each of the rationales the courts have offered to justify creating federal common law under CERCLA. As a result, the Ninth Circuit held that its own earlier decision adopting federal common law (on which the Second Circuit relied in this case) is no longer good law. The Ninth Circuit's reading of *O'Melveny* is directly contrary to the decision of the court below, and provides further evidence that the conflict among the circuits will persist until this Court intervenes.

I. THE COURT'S DECEMBER 12, 1997 GRANT OF CERTIORARI IN *UNITED STATES v. CPC INTERNATIONAL* PROVIDES ADDITIONAL REASONS FOR GRANTING CERTIORARI IN THIS CASE ALSO.

The Court's grant of certiorari in *CPC* provides additional support for granting certiorari in this case, for three reasons.

A. The Court's decision to review *CPC* may well require the Court to determine whether it is appropriate to create federal common law under CERCLA to displace traditional rules of state corporation law.

CPC concerns the circumstances in which a parent corporation may be held liable as an "operator" under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), based on its involvement in the affairs of a separate subsidiary corporation. In its Petition, the United States argues that "the plain language" of the statute, which defines an "operator" as "any person * * * operating such facility," CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A), provides a "liability standard" which the court below should have applied: "where the evidence shows that a parent corporation, through the use of *its own agents*, actively participated in the subsidiary's operation of a facility, the parent corporation is directly liable under federal law." Petition for a Writ of Certiorari at 16, 19,

20, *United States v. CPC Int'l, Inc.*, No. 97-454 (filed Sept. 10, 1997) (emphasis original).

The United States' Petition in *CPC* struggles to define the issue of parent corporation liability as a straightforward question of statutory interpretation. Nevertheless, the lower court recognized that the liability standard the United States advocates would require the court to disregard "time-honored limited liability protections afforded by the corporate form," and to rely instead on "vague, expansive concepts" of parent corporation liability having no basis in CERCLA's text or legislative history. *United States v. Cordova Chem. Co.*, 113 F.3d 572, 579 (6th Cir. 1997) (*en banc*). The Sixth Circuit refused to adopt the federal common law standard of parent corporation liability advocated by the United States; the court ruled that "[w]hether the circumstances in this case warrant a piercing of the corporate veil will be determined by state law." *Id.* at 580. As a basis for its holding, the Sixth Circuit cited and followed its earlier decision in *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991), in which it had applied state law, and refused to create federal common law, to resolve successor liability issues under CERCLA. *See Cordova Chem.*, 113 F.3d at 580.[1]

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[1] Other courts have similarly recognized that the parent corporation liability standard the United States prefers is *not* based on the specific text or legislative history of the statute, but instead requires creation of rules of decision based on nothing more than the statute's general policy objectives (*i.e.*, federal common law). *See, e.g., Schiavone v. Pearce*, 79 F.3d 248, 253-54 (2d Cir. 1996); *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991); *United States v. Mottolo*, 695 F. Supp. 615, 624 (D.N.H. 1988); *see also* Kathryn R. Heidt, *Liability of Shareholders Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)*, 52 Ohio St. L.J. 133, 183-86 (1991); Evelyn F. Heidelberg, *Parent Corporation Liability Under CERCLA: Toward a Uniform Federal Rule of Decision*, 22 Pac. L.J. 854 (1991); Note, *Liability of Parent*

Likewise, in this case the court of appeals recognized the close relationship between the successor liability and parent corporation liability issues, noting that its adoption of a federal common law standard of successor liability was consistent with its earlier decision holding a parent corporation directly liable for the actions of a subsidiary. *See* Pet. App. at 22a (citing *Schiavone v. Pearce*, 79 F.3d 248 (2d Cir. 1996)).

Despite the narrow manner in which the United States has attempted to frame the issue in *CPC*, it is likely the Court will find it necessary to address the issue decided by the courts below, both in this case and in *CPC*: whether it is appropriate to create federal common law standards of liability under CERCLA, preempting established state corporation law.

B. Answering only the narrow question presented by the certiorari petitions in *CPC* would not resolve the existing circuit conflict concerning whether it is proper to create federal common law in CERCLA cases, but deciding this case also would do so.

As the Petition explains, the question whether it is appropriate to create federal common law under CERCLA to override state laws governing business organizations arises in a number of closely-related contexts. The courts of appeals have considered whether it is appropriate to create federal common law to impose CERCLA liability on asset purchasers, parent corporations, dissolved corporations and their shareholders, and limited partners, and have reached conflicting conclusions. Pet. at 10-11. The federal common law issue has arisen most frequently in connection with the successor liability of asset pur-

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Corporations for Hazardous Waste Cleanup and Damages, 99 Harv. L. Rev. 986, 1003 (1986) (recognizing that "Congress did not specifically state whether parent corporations of responsible parties should be brought within the purview of CERCLA," and arguing that the courts should therefore develop federal common law rules to govern the CERCLA liabilities of parent corporations).

chasers. Reply Br. at 8-9 n.10; Reply App. at 1a-6a. This issue has badly divided the courts of appeals, and demands immediate resolution.

If the Court decides *CPC* based solely on a construction of CERCLA's "operator" definition, however, that decision will do nothing to resolve the larger issue whether there is any justification in CERCLA for creating a federal common law of business organizations. Indeed, the decision would not even resolve all of the issues concerning *parent corporation liability* under CERCLA, since a decision rejecting the United States' statutory construction argument would not necessarily resolve the issue whether state law, or federal common law, should supply the standard for parent corporation "operator" liability. Compare *Schiavone v. Pearce*, 79 F.3d 248, 253-54 (2d Cir. 1996) (federal common law), with *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990) (state law), *cert. denied*, 498 U.S. 1108 (1991). Moreover, a decision in *CPC* would not resolve the circuit conflict concerning the liability of parent corporations as facility "owners", or as "arrangers" for disposal.[2]

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[2] There is a conflict among the circuits concerning whether federal common law or state law controls a parent corporation's liability as the "owner" of contaminated property whose title is held by a subsidiary. Compare *Lansford-Coaldale Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993) ("given the federal interest in uniformity in the application of CERCLA, it is federal common law, not state law, which governs when corporate veil-piercing [to impose 'owner' liability on a parent corporation] is justified under CERCLA"), with *Cordova Chem.*, 113 F.3d at 582 (parent corporation can only be held liable as an "owner" based on piercing the corporate veil under state law). The *CPC* Petitions do not challenge the Sixth Circuit's holding that state law governs the circumstances in which a parent corporation can be held liable as an "owner" of its subsidiary's property. Moreover, in a later decision in *CPC*, the district court has held that state law also governs the circumstances in which a parent corporation can be held liable as an "arranger" based on its involvement in its subsidiary's affairs. *United States v. CPC Int'l, Inc.*, No. 1:96-680 (W.D. Mich. Aug. 11, 1997). Conversely, the Eighth Circuit has

Deciding *CPC* alone will not finally resolve the federal common law issue, and will result in a host of subsequent petitions addressing facets of this single issue on a piecemeal basis. Granting certiorari in this case will assure that the propriety of creating federal common law under CERCLA is determined, and the interrelated circuit conflicts resolved, finally and without further delay.

C. The grant of certiorari in *CPC* shows there is no rule against reviewing interlocutory decisions which reverse dispositive rulings and remand.

The United States' Brief in Opposition in this case argues that the Petition should be denied because the court of appeals reversed a grant of summary judgment, and remanded for further proceedings. *E.g.*, Br. in Opp. at 13-14, 16. Petitioners addressed this argument in their Reply Brief.[3] In its Reply Brief in *CPC*, the United States took a position directly contrary to its Brief in Opposition in this case, and argued that certiorari should be granted even though the court of appeals had remanded for further factual development:

> [T]here is [] no merit to CPC's suggestion that review is unwarranted because this case is in an interlocutory posture. While the Sixth Circuit directed the district court on remand to make further factual findings and reconsider issues pertaining to the liability of Aerojet's subsidiaries, those issues turn on

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decided this issue as a matter of federal rather than state law. *United States v. TIC Inv. Co.*, 68 F.3d 1082, 1091-92 (8th Cir. 1995), *cert. denied*, 117 S. Ct. 50 (1996). Once again, resolution of the narrow issue of "operator" liability presented by the *CPC* Petitions would not resolve this conflict.

[3] Petitioners argued in their Reply Brief that this Court has frequently granted certiorari in cases which reversed and remanded grants of summary judgment, so long as the Question Presented was properly before the Court. Most notably, the Court granted certiorari in both *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), and *Atherton v. FDIC*, 117 S. Ct. 666 (1997), despite the interlocutory nature of the lower court decisions. Reply Br. at 3.

> a factual inquiry that is irrelevant to resolving the question presented by the petition (as the court of appeals' resolution of that question while ordering the remand plainly suggests).

Reply Brief for the United States at 7 n.2, *United States v. CPC Int'l, Inc.*, No. 97-454 (filed Dec. 7, 1997).

The merit of this argument, and the corresponding lack of merit in the United States' opposition in this case, are established by the Court's grant of certiorari in *CPC*. In this case, as in *CPC*, the court of appeals decided the exact question presented by the Petition, and remanded for further factual development necessary only under the liability standard the court of appeals adopted. That the decision is "interlocutory" does not bar review.

II. THE NINTH CIRCUIT'S DECEMBER 30, 1997 DECISION IN *SANTA FE RAILWAY v. BROWN & BRYANT* REFUSES TO FOLLOW THE DECISION BELOW, AND DEEPENS THE CONFLICT IN THE POST-*O'MELVENY* DECISIONS CONCERNING WHETHER THERE IS ANY JUSTIFICATION FOR CREATING FEDERAL COMMON LAW UNDER CERCLA.

In the decision below, the Second Circuit relied on *Louisiana-Pacific Corp. v. Asarco*, 909 F.2d 1260 (9th Cir. 1990), as support for its decision to create a federal common law of successor liability in CERCLA cases. Pet. App. at 21a. On December 30, the Ninth Circuit decided *Atchison, Topeka & Santa Fe Railway Co. v. Brown & Bryant, Inc.*, No. 96-15529, 1997 WL 792675, and held that *Louisiana-Pacific* has been superseded by *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), and *Atherton v. FDIC*, 117 S. Ct. 666 (1997). Contrary to the decision below, the Ninth Circuit accordingly held that state law, not federal common law, governs successor liability issues in CERCLA cases.

The Ninth Circuit's reading of *O'Melveny* directly conflicts with the interpretation of that case by the court

below. Unlike the decision below, which claimed that *O'Melveny* supports adoption of federal common law under CERCLA, Pet. App. at 86a, the Ninth Circuit recognized that *O'Melveny* "rejected many of the very arguments that *Louisiana-Pacific* accepted in deciding CERCLA necessitated a set of uniform federal rules of successor liability." 1997 WL 792675, at *3. Moreover, while it noted that the decision below invoked the "need for national uniformity" to justify creating federal common law, *id.* at *4 n.3, *Brown & Bryant* held that "there has been no real explanation of the need for uniformity in the particular area of successor liability" sufficient to satisfy *O'Melveny*'s demanding standards. *Id.* *4.[4]

Brown & Bryant deepens the conflict among the post-*O'Melveny* court of appeals decisions concerning whether there is any justification for creating a federal common law of successor liability under CERCLA. The Ninth Circuit's reading of *O'Melveny* directly conflicts with the Second Circuit's interpretation of that seminal decision, and shows that the conflict in the circuits over the meaning and relevance of *O'Melveny* will persist until this Court provides further clarification of the circumstances in which adoption of federal common law is proper.

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[4] The Ninth Circuit also held that, even if it were to adopt federal common law rules of successor liability, the federal common law rule would be the traditional "mere continuation" exception prevailing in most States, *not* the expansive "substantial continuity" exception adopted by the Second Circuit in this case. 1997 WL 792675, at *6.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether federal common law overrides state corporation law limitations on the imposition of successor liability on asset purchasers in cases under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601 *et seq.*

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

ARGUMENT

The Petition for Writ of Certiorari in this case has been held pending the disposition of *United States v. Bestfoods, et al.*, No. 97-454, decided on June 8, 1998. The present Petition is scheduled for consideration at the Court's June 11, 1998 conference.[1]

[1] Because of the short time available, this Supplemental Brief was originally filed on June 9, 1998 in typewritten form.

The Petition for Writ of Certiorari in this case should be granted, since *Bestfoods* expressly reserves the important question this case presents, whether state law or federal common law controls corporate successor liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601 *et seq. Bestfoods* does recognize "[t]here is significant disagreement among courts" concerning the related question whether state law or federal common law governs piercing the corporate veil under CERCLA, but does not decide the issue, as it was not properly presented. ___ U.S. ___, ___ n. 9. The question whether state law or federal common law governs the CERCLA liabilities of business organizations and their owners arises in several closely-related contexts. Language in *Bestfoods* suggests that CERCLA provides no basis for displacing established state corporate law, but *Bestfoods* does not itself resolve this issue, which has badly divided the courts of appeals. Granting this Petition would permit the Court to resolve this important and recurring issue once and for all.

The conflict among the circuits concerning whether it is proper to create federal common law under CERCLA to displace state law of successor liability has deepened since the filing of the Petition in July 1997. At this writing, the First, Sixth and Ninth Circuits have held that state law governs successor liability issues under CERCLA, while the Second, Third, and Fourth Circuits have held that the issue is governed by federal common law.[2]

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[2] *Compare Atchison, T. & S.F. Ry. Co. v. Brown & Bryant, Inc.*, 132 F.3d 1295 (9th Cir. 1997) (state law, not federal common law,

The question whether state law or federal common law governs successor liability issues under CERCLA is controlling in this case. The District Court granted Petitioners' motions for summary judgment under Connecticut law (Pet. App. 79a, 82a); the Second Circuit held that further factual development was necessary, but only to resolve the successor liability issue under the federal common law standard the appellate court created. Pet. App. 22a. Thus, a decision not to create federal common law would finally resolve this case.

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governs successor liability issues under CERCLA; overruling prior decision relied upon by court below); *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994) (same); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991) (same); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401 (1st Cir. 1993) (applying state law to decide CERCLA successor liability issue), *with* decision below, 99 F.3d 505, 112 F.3d 88 (creating federal common law); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992) (same); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91-92 (3d Cir. 1988) (same), *cert. denied*, 488 U.S. 1029 (1989). Three other courts of appeals have applied state law to related issues. *See Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1501-02 (11th Cir. 1996) (state law governs CERCLA liability of limited partners); *Citizens Elec. Corp. v. Bituminous Fire & Cas. Co.*, 68 F.3d 1016, 1019 (7th Cir. 1995) (Easterbrook, J.) (applying state law to decide capacity of dissolved corporation to sue or be sued under CERCLA); *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990) (applying state law to determine derivative CERCLA liability of parent corporation for actions of subsidiary), *cert. denied*, 498 U.S. 1108 (1991).

CONCLUSION

The petition for a writ of certiorari should be granted.

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